# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1904.~~ 1905.

No. ~~528.~~ 176.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, PLAINTIFF IN ERROR,

*vs.*

THEODORE R. CONVERSE, RECEIVER OF THE MINNESOTA THRESHER MANUFACTURING COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED FEBRUARY 10, 1905.

(19,628.)

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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Placita | 2 | 1 |
| Præcipe for summons | 3 | 2 |
| Summons and return thereon endorsed | 5 | 2 |
| Motion for leave to amend summons, etc | 8 | 3 |
| Order of October 4, 1904, granting leave to amend præcipe and summons | 9 | 4 |
| Waiver of notice | 10 | 4 |
| Order of January 24, 1905, granting leave to amend declaration | 11 | 5 |
| Amended declaration | 12 | 5 |
| Demurrer to amended declaration | 31 | 17 |
| Motion of course | 37 | 19 |


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| | Original. | Print |
|---|---|---|
| Judgment of January 28, 1905 | 39 | 19 |
| Petition for writ of error | 42 | 20 |
| Assignment of errors | 45 | 21 |
| Order of January 28, 1905, allowing writ of error | 47 | 22 |
| Order of January 28, 1905, approving bond, etc | 48 | 23 |
| Bond on writ of error | 49 | 23 |
| Præcipe for record | 50 | 25 |
| Clerk's certificate | 52 | 25 |
| Writ of error | 53 | 26 |
| Citation | 54 | 27 |
| Service of citation | 55 | 27 |

1 Circuit Court of the United States, Northern District of Illinois, Northern Division.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Mr. J. H. Chandler, Mr. C. A. Severance, attorneys for Theodore R. Converse, receiver.

Mr. Frederick S. Winston, Mr. John Barton Payne, Mr. Silas H. Strawn, Mr. Lester H. Strawn, attorneys for First National Bank of Ottawa, Illinois.

2 Pleas in the circuit court of the United States for the northern district of Illinois—northern division, begun and held at the United States court room, in the city of Chicago, in said district and division, before the Hon. Christian C. Kohlsaat, district judge of the United States for the northern district of Illinois, on Saturday the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and five, being one of the days of the regular December term of said court, 1904, and of our Independence the one hundred and twenty-ninth year.

MARSHALL E. SAMPSELL, Clerk.

3 Northern District of Illinois, Northern Division.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Be it remembered that on this day to-wit: the twenty-third day of May, 1904, came Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, by his attorney, Mr. J. H. Chandler, and filed in the clerk's office of said court his certain præcipe praying the issuance of a summons in the above entitled cause, which said præcipe is in the words and figures following to-wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, Northern Division, } ss:

Circuit Court, May Term, A. D. 1904.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
vs.
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS (a Corp., &c.).
} In Assumpsit. Damages, $10,000.00.

The clerk of said court will issue a summons in said cause to said defendants, in a plea of assumpsit, to the damage of said plaintiff in the sum of $4932.00 & interest, — dollars direct the same to the United States marshal for said district to execute and make it returnable to the July term of said court, 1904.

Dated this 23rd day of May, A. D. 1904.

J. H. CHANDLER,
Plaintiff's Attorneys.
C. A. SEVERANCE, Of Counsel.

To Marshall E. Sampsell, Esq., clerk.

(Endorsed:) Filed May 23, 1904, Marshall E. Sampsell, clerk.

4 And on the same day to-wit: the twenty-third day of May 1904, there issued out of the clerk's office of said court in said entitled cause a certain summons, which said summons together with the marshal's return thereon endorsed is in the words and figures following to-wit:

5 Circuit Court of the United States of America, Northern District of Illinois, ss:

The United States of America to the marshal of the northern district of Illinois, Greeting:

We command you to summon First National Bank of Ottawa, Illinois, (a corporation) if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the 1st Monday of July next, to answer unto Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, of a plea of trespass on the case upon promises, to his damage, as is alleged, of ten thou-

sand dollars ($10,000.00) *dollars* and have you then and there this writ.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at Chicago, aforesaid, this 23rd day of May, in the year of our Lord one thousand nine hundred and four and of our Independence the 128th year.

[SEAL.] MARSHALL E. SAMPSELL, Clerk.

6 Marshal's Return.

I have served this writ within my district as follows:

Upon First National Bank of Ottawa, Illinois, a corporation, by reading the same to and within the presence and hearing of Lorenzo Leland, president of said corporation on May 24th, 1904, and at the same time giving him a true copy thereof.

JOHN C. AMES,
U. S. Marshal,
By ASAD UDELL, Deputy,

(Endorsed:) Filed May 31, 1904, Marshall E. Sampsell, clerk.

7 And on to-wit: the fourth day of October, 1904, there was filed in the clerk's office of said court in said entitled cause a certain motion of course in words and figures following to-wit:

8 Circuit Court of the United States, Northern District of Illinois.

CHICAGO, Oct. 4, 1904.

CONVERSE, Rec'v'r, vs. 1ST NAT. BANK OF OTTAWA. } Gen. No. 27243.

Motion of pl'ff for leave to amend præcipe and summons on their face by increasing *ad damnum* in each to $10,000.

Motion allowed, 10 days to plead,

Def't excepts.

J. H. Chandler, plaintiff's attorney.

—— ——, defendant's attorney.

Order:

(Endorsed:) Filed Oct. 4, 1904. Marshall E. Sampsell, clerk.

9 And on to-wit: the fourth day of October, being one of the days of the regular July term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of October 4, 1904.

Leave Give- to Amend upon the Face Thereof the Præcipe and Summons.

THEODORE R. CONVERSE, Receiver, etc.,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Now come the parties by their attorneys and the plaintiff has leave to amend instanter upon the face thereof the præcipe and summons herein by increasing the *ad damnum* to $10,000.00; the defendant excepting to the allowance of said amendment.

10 And on to-wit: the 24th day of January, 1905, there was fi'ed in the clerk's office of said court in said entitled cause a certain waiver of notice in words and figures following to-wit:

Waiver of Notice.

UNITED STATES OF AMERICA, District of Illinois, } *ss.:*

In the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, Illinois, Defendant. } Assumpsit. No. 27243.

And now comes the defendant, First National Bank of Ottawa, Illinois, by Winston, Payne and Strawn and Lester H. Strawn, its attorneys, and waives notice and appearance *in re* motion by plaintiff for leave to file instanter his third amended declaration herein.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
By WINSTON, PAYNE & STRAWN AND LESTER H. STRAWN, Its Attorneys.

(Endorsed:) Filed Jan. 24, 1905, Marshall E. Sampsell, clerk.

11 And on to-wit: the twenty-fourth day of January, 1905, being one of the days of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of January 24, 1905.

Leave to Amend Declaration.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Now come the parties by their attorneys and the plaintiff has leave to file instanter an amended declaration herein.

12 And on to-wit: the twenty-fourth day of January, 1905, came the plaintiff in said entitled cause by his attorney and by leave of court first had and obtained filed in the clerk's office of said court his certain amended declaration in words and figures following to-wit:

Amended Declaration.

UNITED STATES OF AMERICA,
Northern District of Illinois, } *ss:*

In the Circuit Court of the United States, Northern District of Illinois, Northern Division.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, Defendant. } Assumpsit.

Plaintiff's Amended Declaration.

Theodore R. Converse, as receiver of the Minnesota Thresher Manufacturing Company, a resident and citizen of the United States and of the State of Minnesota, plaintiff herein, by J. H. Chandler, his attorney, comes and files this amended declaration and complains of The First National Bank of Ottawa, Illinois, a corporation organized and existing under and by virtue of the *the* laws of the United States of America, and a citizen, resident and inhabitant of the northern district of Illinois, and a citizen, resident and inhabitant of Ottawa, in the county of La Salle and State of Illinois, defendant, in a plea of trespass on the case upon promises.

For that whereas the plaintiff is a resident and a citizen of the State of Minnesota, residing at Stillwater, in the county of Washington, in said State.

13 That the defendant is and at all times hereinafter mentioned, was a corporation organized and existing under the

laws of the United States, and a citizen and resident of the State of Illinois, residing at Ottawa, in the county of La Salle in said State of Illinois.

That on or about to-wit: the twenty sixth day of November, A. D. 1884, to-wit: in the State of Minnesota, the Minnesota Thresher Manufacturing Company was duly incorporated in said State of Minnesota under and pursuant to the provisions of the constitution, and laws of said State of Minnesota; that ever since said date said corporation has continued to be and now is a body corporate, organized, created and existing under and by virtue of the constitution and the laws of said State; and that said corporation is, and at all times has been, a citizen and resident of the State of Minnesota.

That the articles of incorporation of said Minnesota Thresher Manufacturing Company (hereinafter called the thresher company) provided that the objects for which said corporation was formed *was* the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines, and all kinds of farm implements, machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood and iron, or either of them, form the principal component parts, and the manufacture of materials therein used, with a principal place of business in the city of St. Paul, in said State of Minnesota, which afterwards, to-wit: November 27, 1884, to-wit in Minnesota, by amendment to said articles of incorporation, duly made was changed to the city of Stillwater, in
14 said State of Minnesota; that after its incorporation as aforesaid said thresher company engaged in and carried on at St. Paul and at said Stillwater all the classes of business authorized by said articles of incorporation that said articles of incorporation have never been in any way altered, amended or modified except as aforesaid.

That the capital stock of said thresher company as provided and authorized by said articles of incorporation was the sum of seven million dollars ($7,000,000.00) divided into one hundred and forty thousand (140,000) shares of the par value of fifty dollars ($50.00) each; that the said stock is divided into two classes denominated preferred and common stock, the amount of said preferred stock so authorized was the sum of four million dollars ($4,000,000.00) or eighty thousand (80,000) shares of the par value of fifty dollars ($50.00) each, and the amount of said common stock so authorized was the sum of three million dollars ($3,000,000.00) or sixty thousand (60,000) shares of fifty dollars ($50.00) each of which said preferred stock there have been issued and are now outstanding twenty-seven thousand nine hundred and sixty-seven (27,967) shares, and that of the common stock of said corporation there have

been issued and are now outstanding forty-two thousand five hundred and ninety four (42,594) shares.

That the Merchants National Bank of St. Paul, Minn., is and during all the times hereinafter stated has been, a banking corporation organized and existing under the laws of the United States of America, having its place of business at the city of St. Paul, in the State of Minnesota; that on to-wit: the sixth day of May, A. D. 1901, at to-wit: St. Paul, in Ramsey county, Minnesota, the said thresher company was indebted to said Merchants National Bank of St. Paul, Minn., in the sum of two thousand, nine hundred and thirty six dollars and seven cents ($2,936.07); that prior thereto towit on the first day of March, A. D. 1901, an action had been duly
15 commenced in the district court for Ramsey county, Minn., in which the said bank was the plaintiff, and said Thresher Company was the defendant, of which said cause said court, which was a court of general jurisdiction and of record, had acquired jurisdiction of both of the parties and of the subject matter thereof, and on to wit: the sixth day of May, 1901, at to-wit said Ramsey county judgment was duly entered and docketed in said court in favor of said Merchants National Bank of St. Paul, Minn., said plaintiff and against said thresher company for two thousand nine hundred and thirty-six dollars and seven cents ($2,936.07), which said judgment has never been reversed, annulled or set aside either in whole or in part, nor been paid or satisfied. That thereafter to-wit May 25th, 1901, an execution was duly issued out of said court, directed to the sheriff of said Ramsey county and delivered to said sheriff, on to-wit: May 26, 1901, at to-wit: said Ramsey county, who made return thereon to-wit: June 5th, 1901, that after diligent search and inquiry he was unable to find any property of said thresher company in his said county, and returned said execution to said court wholly unsatisfied; that a certain other execution was duly issued out of said court upon said judgment to-wit June 25th, 1901, directed to the sheriff of said Washington county, and that said sheriff duly returned to said court that after diligent search and inquiry he was unable to find any property of said defendant in said county and returned said execution wholly unsatisfied.

That at the time said judgment was entered and said executions were issued and returned as aforesaid, and for a long time prior thereto, and at all times thereafter, said thresher company was, and now is, wholly insolvent and without any assets or property whatsoever.

That after the return of said execution as aforesaid, and on or about to-wit: the fifteenth day of August, 1901, at to-wit:
16 Washington county, Minnesota, said Merchants national bank, as a judgment creditor of said thresher company, duly instituted and commenced in the district court for the said county of Washington, and State of Minnesota, which said court was then and there a court of record and of general jurisdiction, an action against said thresher company under and pursuant to the provisions of

chapter 76 of the General Statutes of the State of Minnesota, and the acts amendatory thereof, and supplementary thereto, for the sequestration of the stock, property, things in action and effects of the said thresher company, and for the appointment of a receiver for the same; that said thresher company was duly and personally served with summons and process in said action, and on or about the sixteenth day of August 1901, duly appeared in said action by its duly authorized attorney.

That on to-wit: the said sixteenth day of August, 1901, at to-wit: said county of Washington, judgment was duly given, rendered and entered in and by said court in an action adjudging that the stock, property, things in action and effects of said thresher company be sequestered, and that a receiver therefor be appointed; that such judgment has never been appealed from nor in any manner modified, reversed, or set aside.

That on to-wit: the sixteenth day of August, 1901, in the court last aforesaid, this plaintiff, Theodore R. Converse, was by said district court for Washington county, Minn., in said cause duly appointed receiver of all the property, assets, rights and interest of said thresher company of every sort or nature, either in law or in equity, and with full authority and direction to sue for, collect, recover, compromise or settle any and all stockholders' liability that may exist under the constitution and laws of the State of Minnesota, or otherwise, and to prosecute and sue for the amount of such liability,

17 or any assessment that might be made by said court on account thereof for the satisfaction of the claims of the creditors of said thresher company, and all expenses of administration of said trust, including fees, allowances, expenses of said receiver and his counsel, and with full power and authority to sue for and enforce the collection of any assessment or stockholders' liability, either in the courts of the State of Minnesota or the courts of any other State or Territory, or the courts of the United States, sitting in any State or Territory of the United States, and with full power and authority to prosecute appeals or sue out writs of error in any such suits or cases that may be so instituted by such receiver for the collection of such assessments or stockholders' liability, and in general to do and perform all acts that in the opinion of said receiver, or that he might be advised were needful or proper for the enforcement and collection of such assessments and stockholders' liability in any of the courts of the United States or the various States and Territories of the United States, and said receiver was further directed to seize and take into his possession, sue for and recover any and all property of every sort and nature, possessed by said corporation.

That this plaintiff afterwards, at to-wit: said Washington county, gave the bond required of him as such receiver, by said order, and said bond was duly approved by one of the judges of the said court and duly filed in said court; and that this plaintiff duly qualified

as such receiver, and entered upon the performance of his duties as such receiver, and ever since has acted, and now is acting as such.

That thereafter an order of said district court of said Washington county was made and entered therein on to-wit: the third day of September, 1901, authorizing and requiring the creditors of said thresher company to become parties to said action, and to appear and exhibit therein their claims against said thresher com-
18 pany, and within the time specified within said order, to-wit: on or before six months from and after the first publication thereof. That after the entry of said order, the said order was duly published as required therein, and that within the time therein limited, and in the manner therein prescribed, certain creditors of said thresher company became parties to said action as intervenors therein, and duly exhibited therein their claims and demands against said thresher company, and proved the same, and after hearing duly had in such action, said claims of such creditors were allowed, to-wit: December eleventh, 1902, to the amount of four hundred and forty-three thousand seven hundred and fifty-two dollars and seventeen cents ($443,752.17) and said last named sum now remains unpaid. That the capital stock paid into said thresher company and all the property and assets of said company have been exhausted.

That at the time of the organization and incorporation of said thresher company, and at all times thereafter, during its corporate existence, and at the time when, and at all times since, the said defendant became a stockholder in said thresher company, as hereinafter alleged, it was provided in and by the constitution and general laws of the State of Minnesota, that each and every stockholder of said corporation, severally assumed liability for the indebtedness of said corporation in case of deficiency or insufficiency of corporate assets to liquidate such indebtedness, to the amount of the par value of the stock so owned by said stockholder; and said stockholder further assumed in case of such deficiency to pay and contribute for the equal benefit of the creditors of such corporation, such amount, not exceeding the par value of the stock held by such stockholder, as might be required to make up such deficiency.

That long prior to the 16th day of August, 1901, and about the first day of January, 1885, and while the provisions of the
19 constitution and laws of the State of Minnesota aforesaid remained in full force and effect, the above named defendant became the owner and holder of two hundred and seventy-four preferred shares of the capital stock of the said thresher company of the aggregate par value of thirteen thousand seven hundred dollars in the manner following to-wit:

At and prior to May 10, 1884, the Northwestern Manufacturing and Car Company was a corporation engaged in the manufacturing business at Stillwater, Minnesota, and was a debtor of the said defendant for money loaned to it, that on May 10, 1884, the district court of Washington county, Minnesota, appointed a receiver for

said corporation and its property; that afterwards and on or about the 26th day of November, 1884, the said defendant together with other creditors, and certain of the stockholders of said corporation organized a new corporation, the same being the said thresher company that said thresher company exchanged its preferred stock at par for the claims of creditors of the Northwestern Manufacturing and Car Company, and exchanged its common stock for the preferred stock of said Northwestern Manufacturing and Car Company, and subsequently, on October 27, 1887, purchased at judicial sale the then remaining assets of the Northwestern Manufacturing and Car Company, paying for the same in part with the said claims so acquired by it, and that said defendant exchanged its claims against the Northwestern Manufacturing and Car Company for the said two hundred seventy-four shares of preferred stock in the capital stock of said thresher company, and has at all times since continued to be and now is the owner and holder of the same and of all thereof.

That at the time, to-wit: January first, 1885, said defendant so as aforesaid became the owner and holder of said two hundred and seventy four (274) shares of the preferred stock of said thresher company, the provisions of the constitution and the laws of the State of Minnesota hereinbefore set forth, were in full force and effect and became a part of defendant's contract of purchase and ownership of said shares of stock; and said defendant in and by the purchase and ownership and holding of said two hundred and seventy four (274) shares of said stock of said thresher company as aforesaid, duly contracted and agreed for a valuable consideration that it would be and remain responsible with the other stockholders of said company for all contracts, debts and engagements of said company while it remained such stockholder, to the amount of its stock therein at the par value thereof, to-wit to the amount of thirteen thousand seven hundred dollars ($13,700.00).

That it is provided by the laws of the State of Minnesota as follows:

General Laws of Minnesota for 1899.

Chapter 272.

"An act to provide for the better enforcement of the liability of stockholders of corporations.

"SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or is respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any stat-

ute of said State, or otherwise, has heretofore made, or shall hereafter make an assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be ap-
21 pointed by any district court of this State, whether under or pursuant to any of the provisions of chapter seventy six (76) of the General Statutes of Eighteen hundred ninety four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this State, or under the general equity powers and practice of such court; the district court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this act provided.

SECTION 2. Under the petition of the assignee or the receiver of any such corporation, or of any creditor of such corporation, who has filed his claim in such assignment or receivership proceedings, the said district court shall, by order, appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the clerk of said court, and shall direct such notice of such hearing to be given to the party presenting said petition, by publication or otherwise, as the court, in its discretion, may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the court shall direct that notice of such hearing be personally served on such assignee or receiver.

SECTION 3. At such hearing the court shall consider such proofs, by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor of officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and expenses and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability. And if it appear to the satisfaction of the court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and dis-
22 charge in full and without delay, its indebtedness, and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of the stockholders, the said court shall thereupon, by order, direct and levy a ratable assessment upon all parties liable as stockholders or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the court, in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders, and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order.

SECTION 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver in case of the failure of any party liable upon or on account of any share or shares of said stock, to so pay the amount so assessed against the same, within the time specified in said order, to prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECTION 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to
23 any subsequent assessment levied by said court as hereinafter provided.

SECTION 6. It shall be the duty of such assignee or receiver, to and he may, immediately after the expiration of the time specified in said order for the payment of the amount to be asses-ed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is liable. Said actions may be maintained against each stockholder, severally, in this State or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found, But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of advantage to the estate and interest of creditors to prosecute the same, said assignee or receiver shall so report to said court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said court. And in such case said court shall not require said receiver to institute or maintain such action unless said court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation except as hereinafter provided."

That on to-wit: the sixteenth day of April, 1902, this plaintiff duly made and caused to be filed with and presented to said district court of Washington county, according to law, a petition by this plaintiff, praying, among other things that said court might by order in said action direct and levy a ratable assessment upon the
24 parties liable as stockholders of said thresher company for such amount, proportion or percentage of the liability for debt on account of each share of said stock, as said court shall deem proper after hearing as by law provided, pursuant to the provisions of chapter 272 of the General Laws of Minnesota for the Year 1899

(an act entitled "An act to provide for the better enforcement of the liability of stockholders of corporations") as hereinbefore set forth, and prayed therein that said court by order appoint a time for hearing such petition and application, and direct such notice thereof to be given as said court should deem proper.

That on to-wit: the sixteenth day of April, 1902, at to-wit: said Washington county, said court duly made and entered its order upon the plaintiff's said petition in pursuance of the provisions of said chapter 272 of the General Laws of the State of Minnesota, of 1899; that notice of said order was duly given in the manner prescribed by said order, notice of said order being duly published and served or duly mailed as therein directed, and that a copy of said order was duly mailed to the defendant herein more than twenty days prior to the date of hearing specified therein, to-wit: June tenth, 1902, that said matter was adjourned from time to time and came on for final hearing on the tenth day of December 1902, at which time evidence was introduced by the receiver and by certain objecting stockholders of the thresher company, and the matter was then and there orally argued to said court by counsel on behalf of said stockholders and by counsel on behalf of this plaintiff, and thereafter on the twenty-second day of December, 1902, said court duly made and entered its order in said action, a true copy of which order is as follows.

"STATE OF MINNESOTA, }
County of Washington. }

District Court, First Judicial District.

25 MERCHANTS NATIONAL BANK OF ST. PAUL, MINN. (a Corporation), Plaintiff,
*v.*
MINNESOTA THRESHER MANUFACTURING COMPANY (a Corporation), Defendant.

Order.

This matter having come on to be heard at a special term of this court held at the court house in the city of Stillwater, in said county and State, on Tuesday, the 10th day of June, 1902, at ten o'clock in the forenoon, pursuant to an order made and entered herein on the 16th day of April, 1902, upon the petition of Theodore R. Converse, receiver of said defendant corporation, which petition was duly filed with the clerk of this court, praying among other things that this court might by order herein, direct and levy a ratable assessment upon the parties liable as stockholders of said defendant corporation, for such amount, proportion or percentage of the liability, for or on account of each share of said stock, as the court shall deem proper

after hearing as by law provided, pursuant to the provisions of chapter 272 of the General Laws of Minnesota for the Year 1899, and said receiver having duly appeared at said special term of court on the said 10th day of June, 1902, in support of the said petition of said receiver by Messrs. Davis, Kellogg and Severance, his attorneys and Messrs. Koon, Wheelan and Bennett, Charles P. Searle and J. H. Denton, Jr., having appeared in opposition thereto on behalf of the following named stockholders of said defendant, to-wit:

D. N. Morgan, of Bridgeport, Conn., George E. Carter, of Boston, Mass., Dime Savings Bank of Norwich, Conn., Hingham National Bank of Hingham, Mass., Mechanics National Bank of Worcester, Mass., Great Falls National Bank of Great Falls, N. H., Naumkeag National Bank of Salem, Mass., Home National Bank of Brockton, Mass., and Second National Bank of Bangor, Me., and said counsel for objecting stockholders having filed a written objection
26 and answer to the said petition, to which a reply was duly filed by the counsel for said receiver; and it appearing to the satisfaction of the court that copies of said orders dated April 16th 1902, were duly published, mailed and served in the manner prescribed therein, and that due notice of said hearing was duly given by said receiver to the defendant and to each stockholder of record of the defendant as directed by said order; and the said matter having been adjourned from time to time, and having duly come on for final hearing on Wednesday, the 10th day of December, 1902, at which time evidence was introduced by the receiver and by said objecting stockholders, and the said matter having been orally argued to this court by M. R. Koon, Esq., one of the counsel for said objecting stockholders on behalf of said stockholders, and by C. A. Severence, Esq., one of the attorneys for said receiver, on behalf of said receiver; and it appearing to the satisfaction of the court after hearing and considering the proofs and evidence introduced at said hearing by and in behalf of said parties respectively and the arguments of counsel, that it is necessary and proper that an assessment of eighteen dollars ($18.00) on each share of said capital stock of said corporation be directed and levied herein against all parties liable as stockholders of said defendant.

Now therefore it is ordered: That an assessment of thirty-six (36%) per cent. of the par value of each share, of the capital stock of said defendant, to-wit: the sum of eighteen dollars ($18.00) on each share thereof, be, and the same is hereby assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder of defendant for, upon or on account of such shares of stock, and that each and every person, corporation or party liable as such stockholder of said defendant, be, and he is hereby directed to
27 pay to Theodore R. Converse, receiver of said defendant, at his office in the city of Stillwater, county of Washington, and said State of Minnesota, within thirty (30) days after the date of this order, the sum of eighteen dollars ($18.00) for and on account of

each and every share of said stock, for or upon which said person, corporation or party is liable as a stockholder of said defendant as aforesaid.

Ordered further: That said receiver forthwith proceed to collect the several amounts due from the several persons, corporations or parties liable as stockholders of said defendant under the terms of this order and hold the amount thus collected subject to the further order of this court herein.

Ordered further: That in case any person, corporation or party liable as a stockholder of said defendant shall fail to pay the amount hereby assessed against the share or shares of stock held or owned by such stockholder, or upon or on account of which he or it may be liable, within the time hereinbefore specified said receiver is hereby directed and authorized to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction whether in this State or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount due from such person, persons corporation or party under the terms of this order.

Ordered further: That said receiver give due notice of this order by mailing a copy of the same within ten days from the date hereof, to each stockholder of said defendant whose name and address is known to said receiver.

By the court.

W. C. WILLISTON,
District Judge.

Dated December 22nd, 1902."

28 The said last mentioned order has never been in any manner reversed, modified or set aside.

That said court in any by said order, ordered that an assessment of thirty-six (36 %) per cent. of the par value of each share of the capital stock of said thresher company, to-wit: the sum of eighteen dollars ($18.00) on each share thereof be and the same was thereby assessed upon and against each and every share of said capital stock, and upon and against the person, corporation or party liable as a stockholder of said thresher company for, upon or on account of said shares of stock, and that each and every person, corporation or party liable as a stockholder of said thresher company pay, and was thereby directed to pay to this plaintiff, as receiver of said thresher company, at his office in the city of Stillwater, county of Washington and State of Minnesota, within thirty (30) days after the date of said order, the said sum of eighteen dollars ($18.00) for and on account of each and every share of said stock for or upon which said person, corporation or party was liable as a stockholder of said thresher company as aforesaid, and that in and by said order, this plaintiff as such receiver, was ordered to give due notice of such order by mailing a copy of the same within ten days from

the date thereof to each stockholder of said thresher company whose name and address was known to said receiver. That eighteen dollars ($18.00) per share was and is necessary to pay the said indebtedness so proved up in said case as aforesaid.

That notice of said last mentioned order of said district court of said Washington county was duly given by this plaintiff to said defendant on to-wit: January 3rd, 1903, at the county aforesaid as prescribed by said order.

And said plaintiff alleges that by virtue of the premises, and the constitution and laws of the said State of Minnesota, said
29 defendant became, was and is liable to pay to said plaintiff the sum of four thousand nine hundred and thirty two dollars ($4932.00) together with interest thereon at the rate of six per cent. (6%) per annum from and after the 21st day of January, A. D. 1903, and being so indebted, the said defendant in consideration thereof, then and there promised said plaintiff to pay him said sum of money last aforesaid, at his request and that said plaintiff demanded of said defendant that he pay the said sum of money last aforesaid, on to-wit: January 21st, 1903, and at divers other times

Yet the said defendant, though often requested, has not paid the same or any part thereof to the plaintiff, but wholly fails, refuses and neglects so to do.

To the damage of said plaintiff of ten thousand dollars ($10,000.00) and therefore he brings suit, etc.

J. H. CHANDLER,
Attorney for Plaintiff, 1443 Railway Exchange,
Chicago, Ill.

C. A. SEVERANCE,
Of Counsel, St. Paul, Minn.

(Endorsed:) Filed Jan. 24, 1905, Marshall E. Sampsell, clerk.

30 And on to-wit: the twenty-eighth day of January, 1905, came the defendant in said entitled cause by its attorneys, Messrs. Winston, Payne and Strawn and Mr. Lester H. Strawn and filed in the clerk's office of said court its certain demurrer to the amended declaration in words and figures following to-wit:

31 Demurrer.

UNITED STATES OF AMERICA, District of Illinois, } ss:

In the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
vs.
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, Defendant.
} Assumpsit. No. 27243.

And the defendant, First National Bank of Ottawa, Illinois, by Winston, Payne and Strawn and Lester H. Strawn, its attorneys, comes and defends, etc., when etc., and says that the said amended declaration of the plaintiff, filed herein on the 24th day of January, 1905, and the matters therein contained in manner and form as the same are above set forth, are not sufficient in law for the plaintiff to maintain his aforesaid action, and that it, the defendant, is not bound by law to answer the same, and this it is ready to verify; wherefore, for want of a sufficient declaration in this behalf, the defendant prays judgment, and that the plaintiff may be barred from maintaining his aforesaid action, etc.

That said amended declaration is insufficient for the following reasons:

(1.) It does not state facts sufficient to constitute a cause of action against the defendant.

32 (2.) It does not show that plaintiff has legal capacity to institute and maintain the present action.

(3.) It shows that said supposed Laws of Minnesota for 1899 are in contravention of clause 1 of section 10 of article 1 of the Constitution of the United States.

(4.) It shows that said supposed Laws of Minnesota for 1899 are in contravention of the fourteenth amendment of the Constitution of the United States.

(5.) It shows that said supposed Laws of Minnesota for 1899, being "An act to provide for the better enforcement of the liability of stockholders of corporations," are in contravention of the Constitution of the United States.

(6.) It shows that said supposed Laws of Minnesota for 1899 unjustly discriminate against nonresident stockholders and are such as will not be enforced in this jurisdiction.

(7.) It shows that the supposed order of the court levied an assessment on stockholders that is excessive and beyond reason.

(8.) It does not show that the supposed corporate indebtedness is

contractual or that it has been judicially determined as against this defendant.

(9.) It does not show that all the necessary steps prescribed by the supposed laws of Minnesota have been taken.

(10.) It shows as a basis of liability, supposed acts of the defendant which are *ultra vires* and void under the national banks act.

(11.) It states conclusions of the pleader instead of facts.

(12.) It does not allege a case within the jurisdiction of this court.

(13.) It is in other respects, uncertain informal and insufficient.

Wherefore defendant prays judgment, etc.

WINSTON, PAYNE & STRAWN,
LESTER H. STRAWN,
Attorneys for Defendant.

33 I certify that in my opinion the foregoing demurrer of the defendant to the amended declaration of the plaintiff, filed herein on the 24th day of January is well founded in law and proper to be filed in the above entitled cause.

LESTER H. STRAWN,
Attorney for Defendant.

34 UNITED STATES OF AMERICA, District of Illinois, } ss:

In the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
vs.
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, Defendant.
} Assumpsit. No. 27243.

STATE OF ILLINOIS, County of Cook, } ss:

Edward C. Maher, being first duly sworn according to law, on his oath deposes and says that he is the agent of The First National Bank of Ottawa, Illinois, the defendant in the above entitled cause, and that he is authorized by said defendant to make this affidavit; and affiant further says that he has read the foregoing demurrer to the amended declaration of the plaintiff and that he believes the same is well founded in law and proper to be filed in said cause and that it is not interposed for the purpose of delaying said suit

35 or any proceedings therein.

EDWARD C. MAHER.

Subscribed and sworn to before me this 28th day of January, 1905.

ARTHUR W. CUPLER,
[SEAL.] Notary Public.

(Endorsed:) Filed Jan. 28, 1905. Marshall E. Sampsell, clerk.

36 And on to-wit: the twenty-eighth day of January, 1905, there was filed in the clerk's office of said court in said entitled cause a certain motion in words and figures following to-wit:

37 Circuit Court of the United States, Northern District of Illinois.

CHICAGO, Jan'y 28, 1905.

CONVERSE, Rec'v'r,
*vs.*
FIRST NATIONAL BANK OF OTTAWA. } Gen. No. 27243.

Motion of plaintiff to overrule demurrer, to amended declaration filed herein on January 24, 1905. And for judgment.

Motion of defendant for writ of error to Supreme Court of United States.

Order: ——

J. R. Chandler, plaintiff's attorney.

Lester H. Strawn and Winston, Payne & Strawn, defendant's attorney-.

(Endorsed:) Filed Jan. 28, 1905, Marshall E. Sampsell, clerk.

38 And on to-wit: the twenty-eighth day of January, 1905, being one of the days of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Honorable Christian C. Kohlsaat, district judge, appears the following entry to-wit:

39 Order.

Circuit Court of the United States, Northern District of Illinois, Northern Division.

SATURDAY, January 28, 1905.

Present: Hon. Christian C. Kohlsaat, district judge.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS.

This cause coming on to be heard on the demurrer to the amended declaration of the plaintiff filed herein on the 24th day of January,

1905, and the court having heard the arguments of counsel and being now fully advised in the premises, doth

Order and adjudge that the said demurrer to the said amended declaration be and the same is hereby over-ruled.

To which ruling of the court the defendant, by its attorneys, then and there excepted. And the said defendant then and there in open court elects to stand by its said demur. er.

And this cause coming on further to be heard upon the application of the plaintiff for judgment therein, and the court having heard the evidence for the said plaintiff and being now fully advised in the premises doth find that there is now due and owing to the plaintiff from the said defendant the sum of forty nine hundred and thirty-two dollars, together with interest thereon at the rate of six per cent. per annum from January 21, 1903, to this date, amounting to the sum of five hundred and ninety-seven dollars and sixty cents, making a total amount of damages due from the said defendant to the plaintiff the sum of five thousand five hundred, twenty nine dollars and sixty cents. It is therefore considered and adjudged that the plaintiff have and recover from the said defendant the said sum of five thousand five hundred and twenty-nine dollars and sixty cents his damages, together with costs of suit taxed
40 and allowed at the sum of thirty-nine dollars and ten cents ($39.10) and that plaintiff have execution therefor.

To the entry of which said judgment the defendant, by its attorney, then and there objected and excepted.

—— ——, Judge.

41 And on to-wit: the twenty-eighth day of January, 1905, came the First National Bank of Ottawa, Illinois by its attorneys and filed in the clerk's office of said court in said entitled cause its certain petition for writ of error in words and figures following to-wit:

42 Petition for Writ of Error.

UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October Term, 1904.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, Plaintiff in Error,
*v.*
THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

To the honorable Chief Justice of the United States:

The petitioner, The First National Bank of Ottawa, Illinois, respectfully shows that on the 28th day of January, A. D. 1905, the

circuit court of the United States in and for the northern division of the northern district of Illinois rendered a judgment against your petitioner, in a certain cause wherein Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, was plaintiff, and your petitioner was defendant, for the sum of five thousand, five hundred and twenty-nine and 60/100 dollars ($5,529.60) and costs, and awarded execution thereon, as will appear by reference to the record and proceedings in said cause:

43 And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the provisions of the Revised Statutes of the United States; all of which will more fully and at large appear by the record of the proceedings in said cause.

Wherefore, your petitioner prays the allowance of the writ of error, returnable to the Supreme Court of the United States, and for citation and supersedeas.

And this it will ever pray, that said judgment be reversed, etc.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
By WINSTON, PAYNE & STRAWN AND LESTER H. STRAWN,
Attorneys for Petitioner.

(Endorsed:) Filed January 28, 1905, Marshall E. Sampsell, clerk.

44 And on the same day to-wit: the twenty-eighth day of January, 1905, came the defendant in said entitled cause by its attorneys and filed in the clerk's office of said court its certain assignment of errors in words and figures following to-wit:

45 Assignment of Errors.

UNITED STATES OF AMERICA:

In the Supreme Court of the United States, October Term, 1904.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS, Plaintiff in Error,
*v.*
THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Defendant in Error.

Writ of Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

And now comes the said First National Bank of Ottawa, Illinois, plaintiff in error, by Winston, Payne & Strawn and Lester H. Strawn, its attorneys, and says that in the record and proceedings and in rendering the judgment aforesaid, there is manifest error in this, to-wit:

(1.) The court below erred in overruling the demurrer of plaintiff in error to the amended declaration filed herein on the 24th day of January, 1905.

(2.) The court below erred in not sustaining the demurrer filed herein on the 28th day of January, 1905, to the said amended declaration.

(3.) The amended declaration filed herein on the 24th day of January, 1905, and upon which said judgment was rendered, does not support the judgment.

(4.) The court erred in rendering a judgment in favor of the defendant in error and against the plaintiff in error.

46 (5.) The court below erred in not holding that the supposed Laws of Minnesota for 1899, are in controvention of the Constitution of the United States.

(6.) The court below erred in holding that plaintiff might recover interest, and in including interest in said judgment rendered herein, and in giving judgment in favor of the plaintiff and against the defendant for too great an amount.

(7.) The said judgment was given in favor of said Theodore R. Converse, receiver of The Minnesota Thresher Manufacturing Company, defendant in error, whereas by the laws of the land it ought to have been given in favor of The First National Bank of Ottawa, Illinois, plaintiff in error.

Wherefore, the said plaintiff in error prays that said judgment may be reversed, annulled and held for naught, etc.

WINSTON, PAYNE & STRAWN AND
LESTER H. STRAWN,
Attorneys for Plaintiff in Error.

(Endorsed:) Filed January 28, 1905, Marshall E. Sampsell, clerk.

47 And on the same day to-wit: the 28th day of January, 1905, being one of the days of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge, appears the following entry to-wit:

Order of January 28, 1905, Allowing Writ of Error upon Filing Bond in the Sum of $7,500.00.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
vs.
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Now again come the parties by their attorneys, and the defendant having filed its petition for a writ of error and assignment of

errors, it is ordered that a writ of error be and the same is hereby allowed to have reviewed in the Supreme Court of the United States the judgment entered herein of this date, upon the defendant filing its bond on writ of error in the sum of seven thousand five hundred dollars, the same to operate as a supersedeas and stay the execution of the said judgment.

48 And on the same day to-wit: the twenty-eighth day of January, 1905, being one of the days *of the days* of the regular December term of said court, 1904, in the record of proceedings thereof in said entitled cause before the Hon. Christian C. Kohlsaat, district judge appears the following entry to-wit: ·

Order of January 28, 1905, Approving Bond.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*vs.*
FIRST NATIONAL BANK OF OTTAWA, ILLINOIS. } 27243.

Now again comes the defendant by its attorney and presents its bond on writ of error in the penalty of seven thousand five hundred dollars with Lester H. Strawn, as surety which bond is approved by the court and ordered to be filed and said defendant having now complied with the rules and regulations of the Supreme Court of the United States and the orders entered herein, said writ of error is allowed and ordered that a writ of citation issue returnable to the Supreme Court of the United States within thirty days.

And on the same day to-wit: the 28th day of January, 1905, there was filed in the clerk's office of said court in said entitled cause a certain bond in words and figures following to-wit:

49 Know all men by these presents, that we, First National Bank of Ottawa, Illinois, as principal, and Lester H. Strawn, of Ottawa, Illinois, as surety, are held and firmly bound unto Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, in the full and just sum of seven thousand five hundred (7500) dollars, to be paid to the said Theodore R. Converse, receiver as aforesaid, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of January in the year of our Lord one thousand nine hundred and five (1905).

Whereas, lately at a term of the United States circuit court for the northern division of the northern district of Illinois, in a suit depending in said court, between Theodore R. Converse, receiver of

the Minnesota Thresher Manufacturing Company and First National Bank of Ottawa, Illinois, a judgment was rendered against the said First National Bank of Ottawa, Illinois, for the sum of five thousand five hundred and twenty-nine dollars and sixty cents ($5529.60) and costs of suit and the said First National Bank of Ottawa, Illinois, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington within 30 days from the date thereof,

Now, the condition of the above obligation is such, that if the said First National Bank of Ottawa, Illinois, shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make said plea good, then the above obligation to be void; else to remain in full force and virtue.

FIRST NATIONAL BANK OF
OTTAWA, ILLINOIS, [SEAL.]
By CHARLES E. HOOK, Cashier. [SEAL.]
LESTER H. STRAWN. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved to operate as a supersedeas, Jan. 28, 1905.

KOHLSAAT,
Judge Circuit Court of United States,
Northern District of Illinois.

(Endorsed:) Filed Jan'y 28, 1905, Marshall E. Sampsell, clerk.

50 And on to-wit: the 28th day of January, 1905, there was filed in the clerk's office of said court in said entitled cause a certain præcipe for record in words and figures following to-wit:

Præcipe for Record.

UNITED STATES OF AMERICA, District of Illinois, } ss:

In the Circuit Court of the United States in and for the Northern Division of the Northern District of Illinois.

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company, Plaintiff,
vs.
FIRST NATIONAL BANK OF OTTAWA, Illinois, Defendant.
} Assumpsit. No. 27243.

To Marshall E. Sampsell, clerk of said court:

Please make up an authenticated transcript of the record in the above entitled cause and insert therein the following:

(1.) A copy of the præcipe.
(2.) A copy of the process of summons and return thereon.
(3.) A motion of plaintiff made October 4, 1904 to amend præcipe and summons.
(4.) The order of the court thereon.
(6.) Order for leave to file amended declaration instanter.
(7.) Third amended declaration filed January 24, 1905.
(8.) Demurrer thereto and filing.
(9.) Placita. Hearing on demurrer, order overruling, exception, defendant abiding by demurrer, judgment, exception, assign-
51 ment of errors, petition for writ of error, bond, supersedeas, and all files orders and proceedings in the cause subsequent to the filing of the third amended declaration aforesaid.

Dated, Chicago, Illinois —— — 1905.

WINSTON, PAYNE & STRAWN,
LESTER H. STRAWN,
Attorneys for Defendant.

O. K.
J. H. CHANDLER,
Attorney for Plaintiff.

(Endorsed:) Filed Jan'y 28, 1905, Marshall E. Sampsell, clerk.

52 NORTHERN DISTRICT OF ILLINOIS, Northern Division, } ss:

I, Marshall E. Sampsell, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the

proceedings had of record in said court and made in accordance with præcipe filed in the cause entitled Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, plaintiff, *vs.* First National Bank of Ottawa, Illinois, defendant, general number 27,243, as the same appear from the original records and files of said court now remaining in my custody and control.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district this third day of February A. D. 1905.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL, Clerk.

53 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the northern district of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company and First National Bank of Ottawa, Illinois, a manifest error hath happened to the great damage of the said First National Bank of Ottawa, Illinois, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of January, in the year of our Lord one thousand nine hundred and five (1905).

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

MARSHALL E. SAMPSELL,
Clerk of the Circuit Court of the United States
for the Northern Dist. of Illinois.

Allowed by
HON. CHRISTIAN C. KOHLSAAT,
District Judge.

[Endorsed:] 27,243. Supreme Court of the United States. Converse, rec'r *vs.* First Nat'l Bank of Ottawa, Ill. Writ of error. Filed January 28, 1905. Marshall E. Sampsell, clerk. Copy deposited for the defendant in error in the clerk's office, U. S. circuit court, northern district of Illinois.

54 UNITED STATES OF AMERICA, *ss:*

To Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a petition for writ of error, filed in the clerk's office of the circuit court of the United States, northern division of the northern district of Illinois, wherein First National Bank of Ottawa, Illinois, was petitioner and you, the said Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company was defendant in error and you are required, to show cause, if any there be, why the judgment rendered against the said petitioner as in the said petition mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Christian C. Kohlsaat, judge, this 28th day of January, in the year of our Lord one thousand nine hundred five (1905).

KOHLSAAT, Judge.

[Endorsed:] No. 27243. Supreme Court of the United States Converse, rec'r, *vs.* First Nat'l Bank of Ottawa, Ill. Citation to the Supreme Court of the United States. Circuit court of the United States, northern district of Illinois, northern division. Filed Jan. 28, 1905. Marshall E. Sampsell, clerk. Service of the within citation is accepted this 28″ day of Jan'y, 1905. Theodore R. Converse as receiver by J. H. Chandler & C. A. Severance, his att'ys.

Endorsed on cover: File No. 19,628. N. Illinois C. C. U. S. Term No. 528. First National Bank of Ottawa, Illinois, plaintiff in error, *vs.* Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company. Filed February 10th, 1905. File No. 19,628.

FILE COPY.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court U. S.
FILED
DEC 15 1905
JAMES H. McKENNEY,
Clerk.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
*Plaintiff in Error,*
*vs.*
THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
*Defendant in Error.*

No. 176.
In Error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF ON BEHALF OF PLAINTIFF IN ERROR ON CONSTITUTIONAL QUESTIONS.

LAURENCE ARNOLD TANZER,
~~LESTER H. STRAWN,~~
*Of Counsel for Plaintiff in Error.*

C. G. BURGOYNE, Walker and Centre Streets, N. Y.

# INDEX.


| | PAGE |
|---|---|
| Statement of facts | 1 |
| Constitutional questions open in this Court | 9 |
| Point I. Act of 1899 impairs obligation of contract: | |
| (A) Liability contractual | 12 |
| (B) Nature and extent of liability | 15 |
| (C) Contract impaired | 22 |
| (1) Liability to Receiver instead of to Creditors | 22 |
| (2) Liability imposed for costs and expenses of Receivership and Receiver's commissions | 24 |
| (3) Liability imposed for estimated probable liabilities and deficiency | 24 |
| (4) Liability imposed for estimated probable insolvencies of other stockholders | 26 |
| (5) Liability imposed for liabilities incurred by corporation while in liquidation | 27 |
| (6) Liability imposed for liabilities other than debts | 27 |
| (7) Change in entire nature of liability through acting on remedy | 27 |
| (8) Deprivation of right to be heard as to claims and of vested defenses | 28 |
| (9) Discrimination against non-resident stockholders | 29 |
| (10) Conclusive judgment permitted against non-resident stockholders in proceeding to which they are not parties | 30 |
| Decisions holding these changes unlawful | 30 |
| Point II. Act of 1899 takes away rights of creditors | 39 |
| Point III. Act of 1899 takes away property of stockholders without due process of law | 42 |
| (A) Proceedings without personal service of process not due process of law | 42 |
| (B) Stockholders not represented by corporation in the absence of assent thereto | 45 |
| Point IV. Plaintiff as Receiver cannot maintain this action | 57 |

# In the Supreme Court of the United States.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
Plaintiff in Error,

AGAINST

THEODORE R. CONVERSE, Receiver of the Minnesota Thresher Manufacturing Company,
Defendant in Error.

October Term, 1905.

In error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF ON BEHALF OF PLAINTIFF IN ERROR ON CONSTITUTIONAL QUESTIONS.

### Statement of Facts.

This cause comes up on writ of error to review a judgment of the Circuit Court of the United States for the Northern Division of the Northern District of Illinois, in favor of the plaintiff, overruling a demurrer to the declaration. The action is brought by the Receiver of the Minnesota Thresher Manufacturing Company, a Minnesota corporation, to recover of the defendant, one of the stockholders in that corporation, the amount of an assessment assumed to be levied by a decree of the Supreme Court of the State of Minnesota on the double liability of the stockholders.

This brief discusses the important constitutional question raised by the demurrer, by reason of which the cause is brought directly to this Court.

The provisions of law relating to the double liability of stockholders at the time when plaintiff-in-error acquired its

stock were Section 3 of Article 10 of the Constitution of the State of Minnesota, which provides as follows:

> "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him;"

and Chapter 76 of the General Statutes of Minnesota of the year 1878, as re-enacted in the General Statutes of 1894. The provisions of that Statute are as follows:

> "SECT. 5897. Whenever a judgment is obtained against any corporation incorporated under the laws of this State, and an execution issued thereon is returned unsatisfied in whole or in part, upon the complaint of the person obtaining such judgment, or his representatives, the District Court within the proper county may sequestrate the stock, property, things in action and effects of such corporation, and appoint a receiver of the same.
>
> SECT. 5905. Whenever any creditor of a corporation seeks to charge the directors, trustees or other superintending officers of such corporation, or the stockholders thereof, on account of any liability created by law, he may file his complaint for that purpose in any district court which possesses jurisdiction to enforce such liability.
>
> SECT. 5906. The Court shall proceed thereon, as in other cases, and when necessary shall cause an account to be taken of the property and debts due to and from such corporation, and shall appoint one or more receivers.
>
> SECT. 5907. If, on the coming in of the answer or upon the taking of any such account, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the Court may proceed, without appointing any receiver, to ascertain the respective liabilities of such directors and stockholders, and enforce the same by its judgment, as in other cases.
>
> SECT. 5908. Upon a final judgment in any such action to restrain a corporation or against directors or stock-

holders, the Court shall cause a just and fair distribution of the property of such corporation, and of the proceeds thereof to be made among its creditors.

SECT. 5909. In all cases in which the directors or other officers of a corporation, or the stockholders thereof, are made parties to an action in which a judgment is rendered, if the property of such corporation is insufficient to discharge its debts, the Court shall proceed to compel each stockholder to pay in the amount due and remaining unpaid on the shares of stock held by him, or so much thereof as is necessary to satisfy the debts of the company.

SECT. 5910. If the debts of the company remain unsatisfied, the Court shall proceed to ascertain the respective liabilities of the directors or other officers and of the stockholders, and to adjudge the amount payable by each, and enforce the judgment, as in other cases.

SECT. 5911. Whenever any action is brought against any corporation, its directors or other superintending officers or stockholders, according to the provisions of this chapter, the Court, whenever it appears necessary or proper, may order notice to be published in such a manner as it shall direct, requiring all the creditors of such corporation to exhibit their claims and become parties to the action, within a reasonable time, not less than six months from the first publication of such order, and, in default thereof, to be precluded from all benefit of the judgment which shall be rendered in such action, and from any distribution which shall be made under such judgment."

In April, 1899, many years after the plaintiff in error acquired its stock, the Legislature of Minnesota enacted Chapter 272 of the General Laws of Minnesota for the year 1899, which is the act whose constitutionality is here called in question. That act is entitled "An act to provide for the better enforcement of the liability of stockholders of corporations," and provides as follows:

SECTION 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota,

whose stockholders or any of them are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the Constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made or shall hereafter make any assignment for the benefit of its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota and the acts amendatory thereof, or under or pursuant to any other statute of this State or under the general equity powers and practice of such court; the district court appointing such receiver or having jurisdiction of the matter of said assignment may proceed as in this act provided.

SECTION 2. Upon the petition of the assignee or receiver of any such corporation, or of any creditor of such corporation who has filed his claim in such assignment or receivership proceedings, the said district court shall by order appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the Clerk of said Court, and shall direct such notice of such hearing to be given by the party presenting said petition, by publication or otherwise, as the Court in its discretion may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the Court shall direct that notice of such hearing be personally served on such assignee or receiver.

SECTION 3. At such hearing the Court shall consider such proofs by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of

said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and expenses; and also as to what parties are or may be liable as stockholders of said corporation and the nature and extent of such liability. And if it appear to the satisfaction of the Court that the ordinary assets of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of its stockholders; the said Court shall thereupon by order direct and levy a ratable assessment upon all parties liable as stockholders, or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the Court in its discretion may deem proper (taking into account the probable solvency or insolvency of stockholders and the probable expenses of collecting the assessment); and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said Court may specify in said order.

SECTION 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver, in case of the failure of any party liable upon or on account of any share or shares of said stock to so pay the amount so assessed against the same within the time specified in said order, to prosecute actions against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

SECTION 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all mat-

ters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said Court, as hereinafter provided.

SECTION 6. It shall be the duty of such assignee or receiver to, and he may, immediately after the expiration of the time specified in said order for the payment of the amount so assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of said stock who has failed to pay the amount so assessed against the same, for the amount for which such party is so liable. Said actions may be maintained against each stockholder, severally, in this State, or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that i will be of disadvantage to the estate and the interest of creditors to prosecute the same, said assignee or receiver shall so report to said Court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said Court. And in such case said Court shall not require said Receiver to institute or maintain such action unless said Court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation, except as hereinafter provided.

SECTION 7. In any case where the Court shall have levied an assessment against stockholders as in this act provided, for a less amount or proportion than the full amount of the liability upon or on account of the stock of said corporation, and it shall thereafter be made to appear to the satisfaction of said Court by petition or otherwise, and upon hearing as hereinbefore provided, that by reason of the insolvency of stockholders, or for any other cause, it is necessary or desirable or for the interest of creditors that another and further assess-

ment upon or against said stock be levied, the Court shall by order direct and levy a further and additional assessment for such amount, proportion or percentage of the liability upon or on account of each share of said stock, as said Court in its discretion may deem proper, and in the same manner may levy further and additional assessment upon said stockholders, and against said stock, not exceeding in the aggregate, the maximum of liability upon or on account of the stock of said corporation.

SECTION 8. All the provisions of this act shall apply to any such assessment levied by said Court after the first, and to the proceedings preliminary to levying and directing the same, to the same extent and with the same force and effect as to the first assessment so levied under the provisions of this act.

SECTION 9. Where two (2) or more such assessments are levied or directed, the assignee or receiver may join the causes of action accruing against any stockholder upon any two or more such assessments in a single action against such stockholder or he may, at his discretion, unless otherwise directed by the Court, maintain a separate action against each stockholder for each successive assessment levied or directed.

SECTION 10. If said assignee or receiver shall fail to institute and prosecute an action against any stockholder who has failed to pay any such assessment or assessments, or to prosecute such an action with diligence after instituting the same, any stockholder or stockholders who have paid in full the amount of any such assessments, or any creditor or creditors of said corporation, may petition said Court to require said assignee or receiver to prosecute such action against such stockholders so failing to pay as aforesaid, or to permit the party or parties so petitioning to institute and maintain, or to continue the prosecution of such action in the name of said assignee or receiver, and for the benefit of said estate, and if said party or parties so petitioning shall furnish security or indemnity for costs and expenses as the Court may direct, the said Court shall thereupon require said assignee or receiver to forthwith

prosecute such action, or in its discretion may permit such party or parties so petitioning to institute and prosecute or continue the prosecution of the same as aforesaid.

SECTION 11. If, after the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings, there shall remain any surplus money or property in the hands of the assignee or receiver, the same shall be distributed under the direction of said Court, and in such a manner as may be just and equitable, among those stockholders who have paid the assessments levied against their stock as herein provided. And any stockholder who has so paid such assessments levied against his stock shall, in addition to any remedy herein provided for, be entitled to enforce contribution from stockholders who have not paid such assessments, and for that purpose may be subrogated to the rights of the creditors of said corporation against such defaulting stockholders, in such manner and to such extent as may be just and equitable.

SECTION 12. Whenever, in a proceeding heretofore instituted under the then existing laws of this State to enforce the liability of stockholders of any such corporation, a portion of the amount for which the stockholders of such corporation are liable has been collected, but the amount so collected is insufficient to pay and discharge claims against said corporation in full, and there remain stockholders who were not made parties to such proceedings, then, notwithstanding final judgment may have been rendered and entered in said proceeding against those stockholders who were made parties thereto, the District Court having jurisdiction may proceed as in this act provided and may levy assessments in the manner herein prescribed to such extent as may be necessary to satisfy and discharge in full all claims against said corporation and all expenses of such proceedings. And the assignee, or receiver, or the receiver appointed by said Court in such proceeding, may institute and maintain

actions to recover the amount of such assessments in the same manner, with the same effect, as in the case of an assessment levied as provided in the preceding sections of this act, and all the provisions of this act shall apply to any stockholder who has paid, or from whom has been collected, in the course of such prior proceeding, any portion of the amount for which he is liable for or on account of the stock held or owned by him, shall be credited upon any assessment levied against said stock as in this section provided with the full amount so paid by or collected from him.

SECTION 13. This act shall not apply to any action now pending to which stockholders of such corporations have been made parties under the provisions of chapter seventy-six (76), General Statutes, of eighteen hundred and ninety-four (1894) and acts amendatory thereto, and in which the issue as to who are stockholders has heretofore been tried and determined by the courts; except that after final judgment in such action, if a proper case exists under the provisions of section twelve (12) of this act, the Court and parties may proceed in the manner prescribed by said section twelve (12).

SECTION 14. All acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 15. This act shall take effect and be in force from and after its passage.

Approved April 18, 1899.

The proceedings in Minnesota, resulting in the assessment against the plaintiff in error, to recover which this action is brought, were had without its presence and without notice to it. The only notice alleged in the declaration is notice by publication and by mail.

**The Constitutional questions raised by this appeal are now presented to this Court for the first time.**

The act of 1899 has been sustained by the Supreme Court of Minnesota in *Straw & Ellsworth Manufacturing Co. vs. L. D. Kilbourne Boot & Shoe Co.*, 80 Minn., 125, which also

holds it to be applicable to existing rights of stockholders and creditors in existing corporations. The Appellate Division of the Supreme Court of New York has held that the provisions of the act cannot be enforced against a stockholder resident in that State in an action by a Receiver, proceeding under the act. *Converse vs. Stewart*, 105 App. Div., 478.

This Court decided, in *Hale vs. Allinson*, 188 U. S., 56, that the liability as it existed before the act of 1899 could not be enforced by a Receiver against non-resident stockholders in the courts of their domicile; and that decision was followed in *Finney vs. Guy*, 189 U. S., 335.

The questions here presented were not involved in the decision of this Court in denying an application for a writ of *certiorari* in *Burget vs. Robinson*, 188 U. S., 739. The record and the briefs on the application for the writ in that case show clearly that the questions here presented were not before the Court at all. In that case the Circuit Court had followed the Minnesota decision sustaining the Law of 1899, and stated without argument that the Court was inclined to agree with that decision. *Robinson vs. Brown*, 126 Fed., 429. On the appeal to the Circuit Court of Appeals, the defendant did not press the constitutional questions at all, but conceded that the case was governed by the decision in *Hale vs. Hardon*, 95 Fed., 747, thus abandoning any claim that the questions involved were different in a proceeding under the law of 1899 from those in a proceeding under the earlier act. As was said by the Circuit Court of Appeals on the application for a rehearing, "The defendant conceded that, if *Hale vs. Hardon* should be followed, the right of action of the present plaintiff must be sustained" (*Burget vs. Robinson*, 123 Fed., at page 267). The Circuit Court of Appeals did not, therefore, have before it or consider any question of the constitutionality of the act of 1899, but held that the case was controlled by *Hale vs. Hardon*, and on the authority of that case affirmed the judgment (*Burget vs. Robinson*, 113 Fed., 669). The defendant in that case thereupon applied to this Court for a writ of *certiorari* to review the determination. The main ground of the application, as stated in the record and the briefs, was to resolve the conflict of decisions between *Hale vs. Hardon, supra*, and *Hale vs. Allinson*, 106 Fed., 258.

The differences between the act of 1899 and the earlier statute were not clearly pointed out; the record and briefs do not raise a single constitutional question. When this Court decided *Hale vs. Allinson*, 188 U. S., 56, it thereby put an end to the conflict of decisions as to the right of the Receiver to sue under the former statute. The chief reason for entertaining the application for the writ of *certiorari* thereby fell; and as no constitutional question was presented by the application, there appears to have been no sufficient reason why the writ should have been granted; and this may well have been the reason why it was denied.

However that may be, it is absolutely clear that the questions presented by the present appeal were neither presented nor considered by this Court on the application for a writ of *certiorari* in *Burget vs. Robinson.*

That the questions here presented are still open in this Court clearly appears from the opinion of this Court in the case of *Evans vs. Nellis*, 187 U. S., 271, decided at the same term as *Hale vs. Allinson* and *Burget vs. Robinson.* In that case, the Circuit Court had held unconstitutional, upon substantially the grounds here taken by the plaintiff in error, the act of Kansas, passed in 1899, which changed the law as to the double liability of stockholders in Kansas corporations (*Evans vs. Nellis*, 101 Fed., 920). The Circuit Court of Appeals certified to this Court the question of the constitutionality of the statute. This Court determined that the action there before it could not be maintained, because the Receiver in that case had not complied with the provisions of the act itself, and consequently it became unnecessary to determine the constitutional questions certified. In so deciding, Mr. Justice WHITE, speaking for the court, made the following statement at page 208:

> "Of course, in answering this question, we express no opinion whatever as to how far, if at all, the act of 1899 could validly operate to repeal the right of action in favor of creditors given by the Kansas statute of 1868, so far as creditors are concerned, whose debts accrued prior to the repeal. We of course also express no opinion whatever upon the question of how far the rights and remedies conferred by the act of 1899 could lawfully be enforced against stockholders in corporations who

> became such stockholders prior to the passage of that act. And this of course excludes the intimation of any opinion as to how far the judgment rendered in the court of Kansas in a suit brought by a receiver against the corporation and the resident stockholders, to fix the sum required to pay the corporate debts, would be binding upon non-resident stockholders not directly a party to such action, especially where their subscription to stock had been made prior to the enactment of the act of 1899."

These questions, thus expressly left open, are the precise questions which are now squarely presented to this Court for decision with respect to the Minnesota Act of 1899. Our contention is that while the precise questions have not been determined by this Court, the application of principles long established and well settled will necessarily lead to a determination against the constitutionality of the act in question.

## POINTS.

### I.

### The statute under which the proceedings for the assessment were taken impairs the obligation of the contract of the plaintiff in error as a stockholder.

(A) *The so-called "double liability" of stockholders under the Constitution and laws of the State of Minnesota is a contractual liability.*

In discussing the nature of this liability in *Hanson vs. Davison*, 73 Minn., 454, the Court said, at page 460:

> "The constitution or the statute imposes the liability on all corporations, except those organized for carrying on any kind of manufacturing or mechanical

business, and it follows that every person who becomes a stockholder in a corporation organized under our laws contracts, with reference thereto, and with the creditors of the corporation, that he will be liable for its debts to the limit fixed by our constitution and statutes. This liability, unlike the liability imposed by statute upon directors or officers of a corporation for its debts, because of their fraud or neglect in the management of the affairs of the corporation, is not penal in its nature, to be regarded as a purely statutory liability. It is voluntarily assumed by the act of becoming a stockholder and the obligation thus raised is purely contractual, containing all of the elements of a contract, and it is to be enforced as such (First National Bank vs. Gustin M. C. M. Co., 42 Minn., 327 ; 2 Morawetz on Private Corporations, Sec. 872 ; 3 Thompson on Corporations, Sec. 3059 ; 1 Cook on Stockholders, Sec. 222)."

The same was held by this Court in *Flash vs. Conn*, 109 U. S., 371, where the Court said, at page 377 :

> " Everyone who becomes a member of the company by subscribing to its stock assumes this liability."

In *Hawthorne vs. Calef*, 2 Wall., 10, it was held that the liability of stockholders in a corporation for its debts is a contract between them and the creditors, which may not be impaired by subsequent legislation.

In *Whitman vs. Oxford National Bank*, 176 U. S., 559, the Court held that the double liability of stockholders under the laws of Kansas was contractual in its nature, saying, per BREWER, J., at page 563 :

> " The liability, which by the Constitution and statutes is thus declared to rest upon the stockholder, though statutory in its origin, is contractual in its nature. * * * While the statute of Kansas permitted the forming of the corporation under certain conditions, the action of these parties was purely voluntary. In other words, they entered into a contract authorized by statute."

In *Knickerbocker Trust Company vs. Myers*, 133 Fed., 765, the Court said, of the liability of stockholders under the laws of Maryland :

> " The liability assumed by the defendant in becoming a stockholder, according to the law as it stood at the time he took stock in the corporation in question, in March, 1900, as well as in April, 1903, when the loan was obtained by it from the plaintiff company, was in the nature of a contract with prospective creditors (26 Am. & Eng. Enc. of Law, 2nd Ed., 1020 ; Matthews v. Albert, 24 Md., 535 ; Norris v. Wrenschall, 34 Md., 492) ; and could not, as such, be impaired in any essential particular by state legislation (Hawthorne v. Calef, 2 Wall., 10 ; Flash v. Conn, 109 U. S., 371 ; Richmond v. Irons, 121 U. S., 27 ; Huntington v. Attrill, 146 U. S., 657 ; Concord National Bank vs. Hawkins, 174 U. S., 364 ; Whitman v. Oxford National Bank, 176 U. S., 559). It ran, moreover, as we have seen, directly from the stockholder to the creditor (Collin v. Mayer, 90 Md., 711). And the obligation thus became a part of every contract, debt, and engagement of the corporation, as much as if severally made with the stockholder himself (Richmond v. Irons, 121 U. S., 27)."

As this Court said in *Carroll vs. Green*, 92 U. S., 509, at page 513 :

> " The legislature created the corporation, and prescribed certain terms to which the stockholders should be subjected. This was an offer on the part of the State. It could be accepted or declined. There was no constraint. By taking the stock, the terms were acceded to, the contract became complete, and the stockholders were bound accordingly. The same result followed which would have ensued under the like circumstances between individuals. The assent thus given, and the promise implied are of the essence of the liability sought to be enforced."

The terms of the stockholder's contract are embodied in the constitution and statutes in force at the time when he ac-

quired his stock. In *Von Hoffman vs. City of Quincy*, 4 Wall., 535, the Court said at page 550:

> "It is also settled that the laws which subsist at the time and place of the making of a contract, and when it is to be performed, enter into and form part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement."

In *Webster vs. Bowers*, 104 Fed., 627, the Court said, concerning the constitution and statutes of Kansas imposing a double liability on stockholders:

> "The specific remedy provided by the statute of 1868 for the enforcement of the constitutional liability of the stockholder to the creditor was a part of the contract. A subsequent statute, withdrawing such remedy, and substituting one of a different nature, and one designed to enforce the stockholder's liability for the benefit of the corporation and of all the creditors, would, in operation, impair the obligations of the pre-existing contract and the substantive rights of the plaintiff."

(B) *The nature and extent of the liability, and consequently the terms of the contract, as fixed by the provisions of the Constitution and the statutes existing when the contract was made, and as construed by the decisions of the Courts.*

In *Allen vs. Walsh*, 25 Minn., 543, the Court held that the Constitution and the statute must be construed together. The question in that case was whether the constitutional provision covered the subject-matter, so that the legislature could not impose any liability different from that imposed by the Constitution, or in other cases than those therein provided for. The Court held otherwise, saying at page 551:

> "It is neither within the purport nor object of the provision to define the extent of legislative power, or the rights of stockholders, upon the subject of individual

liability. It simply declares the creation of a liability to the extent named, in the cases referred to; but it does not prohibit its creation in other cases, nor place any limitations upon the power of the legislature to increase the amount of the liability in any case, according as its views of public policy may require. Its only restrictive effect is to prevent legislative action relieving against the constitutional liability, or decreasing it in amount."

In *Whitman vs. Oxford National Bank*, 176 U. S., 559, this Court had under consideration the similar provisions in the Constitution and statutes of Kansas, imposing a double liability on stockholders. The Court said, per BREWER, J., at page 563:

> "But this constitutional provision does not stand alone. The legislature of Kansas has acted on the subject-matter, and the Constitution and the statutes are to be taken together, as making one body of law; nd it serves no good purpose to inquire what rights nd remedies a creditor of a corporation might have, or hat liabilities would rest upon a stockholder if either Con- s tution or statute stood alone and unaided by the other

In *Middletown National Bank vs. Toledo, &c., Ry. Co.*, 197 U. S., 394, the Court, having under consideration the provisions in the constitution and statutes of Ohio on the same subject matter, said, per PECKHAM, J.:

> "The Constitution evidently looks to the legislature for providing means. A statute which is passed in pursuance of such a provision, and which itself provides for the procedure and states the remedy, even though imposing no limit or conditions in regard to such liability other than such as are found in the constitutional provision itself, is, nevertheless, a statute providing a remedy which is to be followed within the principle sustained by the authorities cited below. The statute, under such circumstances, may be said to so far provide for the liability and to create the remedy as

to make it necessary to follow its provisions and to conform to the procedure provided for therein."

The question whether this provision of the Constitution is self-executing and complete in itself, or whether it required legislation to define the character and extent of the liability is not very important in the case at bar. The decisions of the courts of Minnesota have uniformly held that the double liability of stockholders under the laws of Minnesota, is in its nature a liability on the part of all the stockholders to contribute ratably, not in excess of the stock owned by them, to a common fund for the benefit of all the creditors of the corporation, for the purpose of making good any deficiency in the corporate assets for the payment of the corporate debts. It is well settled that a liability of this nature can be justly enforced only by proceedings in equity, in which all the creditors and all the stockholders are parties, to the end that the liability may be properly apportioned among the stockholders, and the fund resulting therefrom may be properly apportioned among the creditors. No other form of remedy is appropriate to a liability of this nature, and, therefore, the remedy in question is the exclusive remedy.

Even assuming that Chapter 76 of the General Statutes of Minnesota did not create or define the liability, but only provided a remedy, and that the constitutional provision was complete in itself, so that the courts would find a remedy, even if there had been no legislation on the subject, it necessarily follows from the principles just stated, that the exclusive remedy must needs have been the same as that provided by the statute. If any other remedy had been provided it would no longer have corresponded to a liability of the nature described.

Our contention is, in other words, that the details of the procedure might be changed, but that the substitution of an entirely different remedy would change the nature of the liability. These principles are well sustained by the authorities.

In *Patterson vs. Stewart*, 41 Minn., 84, the court, having under consideration the question of the appropriate remedy to enforce a statutory liability for debts of a corporation imposed upon directors violating the provisions of the statute, took occasion to draw a distinction between a liability of this nature

and a liability of the character of that involved in the case at bar. The court, after pointing out the great difference between the statutory provisions in different States, and their remedial systems, continued :

> " But we think it will be found generally true that, unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend *upon the character of the liability*. If its object is to create a common fund, limited in amount, for the benefit of all creditors, or all of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share ; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary ; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested, the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to. Horner v. Henning, 93 U. S., 228, is an example of this kind, and these considerations were given much weight in Allen v. Walsh, 25 Minn., 543, and Johnson v. Fisher, 30 Minn., 173, in determining that the exclusive remedy was under Chapter 76."

In *re Martin's Estate*, 56 Minn., 420, it was held that the liability in question could be enforced only by an action under Chapter 76, and a claim to enforce the liability against the estate of a deceased stockholder could not be presented by a creditor of the corporation in a probate court. The Court said :

> " This personal liability was evidently intended to provide for the contingency of a deficiency of corporate

assets, which remain the primary fund for the payment of corporate debts. Hence, it is evident, no action or proceeding can furnish a complete remedy, or protect the rights of all persons interested, except only which brings in all interested parties,—the corporation, all the stockholders, and all the creditors. And for these reasons the courts generally hold, in the absence of any statutory provision, that to enforce such a liability, created for such a purpose, the only remedy is by an action or proceeding to which all those interested are made parties, so that the rights and liabilities of all may be adjusted."

In *Winnebago Paper Mills vs. Northwestern Printing & Publishing Co.*, 61 Minn., 373, 376, it was held that the action provided for by Chapter 76 is the only remedy to enforce the liability.

The nature of the liability was again considered in *National New Haven Bank vs. Northwestern Guaranty Loan Co.*, 61 Minn., 375, where the court, distinguishing it from the liability of stockholders arising out of their failure to observe the requirements of law, said of the double liability, after again pointing out that its object is to create a common fund for all the creditors:

> "In such a case an action at law is not a proper remedy, or any action by a part of the creditors or against a part of the stockholders, but a bill in equity should be brought by or on behalf of all the creditors against all of the stockholders."

In *Hanson vs. Davison*, 73 Minn., 454, the Court said:

> "The remedy for enforcing the liability must, in the first instance, *from the nature of the liability*, be an equitable action. G. S., 1878, Chapter 76; G. S., 1894, Chapter 76, indicates and regulates to some extent the remedy, leaving to the court the duty of making the remedy effectual by an application of the principles of equitable procedure. This statute prescribes the ex-

> clusive remedy only to the extent that an equitable action of the character therein indicated must be first instituted for the enforcement of the liability of stockholders. Such an action, though provided by statute, is essentially an equitable proceeding; and the rules of equity are to be followed, unless inconsistent with the statute. If Chapter 76 were repealed, *equity would find an adequate remedy for the enforcement of the liability.*"

The same principles have been repeatedly recognized by this Court. In *Pollard vs. Bailey*, 20 Wall., 520, it was held that the only remedy to enforce a liability under a statute making stockholders liable ratably to creditors, was by a bill in equity against all, in which an account can be taken. This was followed in *Terry vs. Tubman*, 92 U. S., 156, 161, regarding a statute making stockholders liable "in proportion to the number of shares held by them respectively."

The same principles were applied in *Terry vs. Little*, 101 U. S., 216, which sustained a demurrer to a declaration to enforce a liability of this kind in an action at law. The Court said:

> "*The remedy must always be such as is appropriate to the liability to be enforced.*"

The Court, after quoting the language of the statute, then continued:

> "This, as we think, means that on the failure of the bank each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations. The provision is, in legal effect, for a proportionate liability by all stockholders. Undoubtedly, the object was to furnish additional security to creditors, and to have the payments when made applied to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but as it is to or for all creditors, it must be enforced by or for all."

In *Finney vs. Guy*, 189 U. S., 335, this Court, discussing the liability under the Laws of Minnesota, before the Statute of 1899, said, per PECKHAM, J., at pages 340, 341 :

> "An examination of the Minnesota courts shows that they had held that the remedy provided by the statutes of the State for the enforcement of stockholders' liability was a suit in equity in that State by a creditor in his own behalf and that of all other creditors, against all the stockholders of the corporation, or so many of them as could be served with process, and *that it was exclusive, and no other remedy could be availed of even within the jurisdiction of the courts of Minnesota. That being the law of Minnesota, it would, of course, prevent an action outside the State, by a receiver as well as by any other plaintiff, to enforce the stockholders' liability.*"

The nature of the liability assumed by the defendant in acquiring its stock is thus clearly defined by the decisions of the Supreme Court of Minnesota, which are in harmony with the decisions of this Court on the same subject. The decisions which thus define the liability are as much a part of the plaintiff in error's contract as if they had been expressed in the form of statutory enactment. A change, either by way of subsequent statutes or subsequent decisions, which would have the effect of changing the character of the liability as so defined, constitutes an impairment of the obligation of the stockholder's contract.

Burgess vs. Seligman, 107 U. S., 20.
Anderson vs. Santa Anna, 116 U. S., 356, 361–363.
Muhlker vs. N. Y. & Harlem R. R. Co., 197 U. S., 544.
Allen vs. Fairbanks, 45 Fed., 445, 447.

In the case last cited, the Court said :

> "The parties became stockholders in a corporation of Missouri, subject to the laws of that State, as construed by the courts of the state. These laws, so construed, were rules of property in respect to the rights

and liabilities between the corporation and the stockholders here and everywhere."

Briefly described, the nature of the liability, as settled at the time of the adoption of the act of 1899, was a liability of all the stockholders to contribute equally and ratably to a fund for the benefit of all the creditors to make up any deficiency in corporate assets to pay debts. The liability was such as in its very nature could be enforced only by a single suit in equity at the domicile of the corporation, to which all the stockholders and all the creditors were parties, and which could not be enforced in an action at law or any other proceeding against a part of the stockholders, either at the corporate domicile or elsewhere, and consequently could not be enforced at all by proceedings outside of the State of Minnesota.

Any statute which so changed the remedy as to alter the nature of the liability, impaired the obligation of the contract.

(C) *The act of 1899 changed the contract of the stockholders and impaired its obligation in the following important particulars* :

(1) IT CHANGED THE LIABILITY FROM A LIABILITY TO ALL THE CREDITORS GENERALLY, TO A LIABILITY TO A RECEIVER TO BE APPOINTED BY THE COURT.

Under the law as it existed before the amendment, the liability was one which could be enforced only in an equity action by all the creditors against all the stockholders, as has been pointed out in subdivision B, *supra*. It is well established that the liability was only to the creditors, and not to the corporation, and could not be enforced by a receiver.

In *Re People's Live Stock Insurance Co.*, 56 Minn., 180, the court took a distinction between the liability of stockholders on stock subscriptions, and the double liability, holding that the former could be enforced by a receiver in dissolution proceedings, the latter not. The court said, at page 185,

> "But the constitutional or statutory liability is directly to the creditors. The corporation cannot enforce it. It is no part of its assets."

In *Palmer vs. Bank of Zumbrota*, 65 Minn., 90, 98, it was held error for the court to authorize a receiver to sue the stockholders.

In *Richardson vs. Merritt*, 74 Minn., 354, it was held that in an action brought under Chapter 76 of the General Statutes of Minnesota to enforce the liability in question, that a stockholder cannot set off against such a liability a claim which he holds against the corporation. The Court said at page 362: "This superadded liability is not a corporate asset, and can only be enforced for the benefit of creditors, and then only to the extent of paying the corporate debts remaining unpaid after the corporate assets have been exhausted."

In *Hale vs. Allinson*, 188 U. S., 56, proceedings under Chapter 76 had been taken in the Supreme Court of Minnesota against all stockholders resident in that State. The decree in the proceeding purported to authorize the receiver of the corporation to take action against non-resident stockholders upon the liability. This Court held that the receiver could not maintain the action in any jurisdiction. In the careful opinion of Mr. Justice PECKHAM, it reviewed the decisions of the Courts of Minnesota, and held that the law, as established by those decisions, was, that the liability belonged to the creditors and was not an asset of the corporation; that the receiver could not sue upon it in Minnesota, and therefore certainly could not sue upon it in a foreign jurisdiction. In the course of its opinion the Court said, at page :

> "Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation the amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation, or confer upon any receiver appointed in the case, the right to proceed to enforce it."

To the same effect, with regard to other similar statutes are *Evans vs. Nellis*, 187 U. S., 271, 277; *Jacobson vs. Allen*, 12 Fed., 454.

(2) IT ADDED TO THE LIABILITY OF THE STOCKHOLDERS THE COSTS AND EXPENSES OF THE RECEIVERSHIP (SECTION 3), WHEREAS BEFORE, THEY HAD BEEN LIABLE ONLY FOR THE DEFICIENCY IN ASSETS TO PAY THE DEBTS OF CREDITORS.

Under the law, as it was before, stockholders could not be made liable otherwise than to the creditors for the deficiency in their debts. They were not responsible for the expenses of a receivership or for the receiver's commissions, nor could they be held for the expenses of the receiver in prosecuting actions in other jurisdictions.

It may be argued that the corporate assets might be used to cover the expenses of the receivership, and if what remained was insufficient to pay the corporate debts, the stockholders would be liable for the deficiency, and so, in a sense, they might be made to incur the burden of the expense of the receivership. The answer to this is that that burden could be imposed only to the extent of the sufficiency of the corporate assets to meet the expenses of the receivership. In a case where there were no corporate assets, or not enough to pay the receiver's expenses and commissions, the creditors could in no case have been liable for the deficiency, but only for the amount of debts actually due creditors.

(3) BUT THE STATUTE GOES MUCH FURTHER; IT PROVIDES (SECTION 3) THAT THE COURT SHALL DETERMINE FROM SUCH PROOFS BY AFFIDAVIT OR OTHERWISE AS MAY BE OFFERED, AS TO THE "PROBABLE INDEBTEDNESS" OF THE CORPORATION, AND THE "PROBABLE AMOUNT" OF ASSETS AVAILABLE FOR THAT PURPOSE, AND IN CASE IT DETERMINES THAT SUCH AMOUNT AS MAY BE REALIZED FROM THE ASSETS "WITHIN A REASONABLE TIME" WILL "PROBABLY BE INSUFFICIENT" TO PAY THESE PROBABLE DEBTS AND EXPENSES, THE COURT HAS AUTHORITY TO ORDER SUCH PROPORTIONATE ASSESSMENT "AS THE COURT IN ITS DISCRETION MAY DEEM PROPER (TAKING INTO ACCOUNT THE PROBABLE SOLVENCY OR INSOLVENCY OF STOCKHOLDERS AND THE PROBABLE EXPENSES OF COLLECTING THE ASSESSMENT); AND SHALL DIRECT THE PAYMENT OF THE AMOUNT

SO ASSESSED AGAINST EACH SHARE OF SAID STOCK TO THE ASSIGNEE OR RECEIVER WITHIN SUCH TIME THEREAFTER AS SAID COURT MAY SPECIFY IN SAID ORDER."

In other words, it is left to the discretion of the Court to order and adjudge each stockholder to pay such an amount as it may deem proper on its estimate of "probable indebtedness and expenses."

Contrast this with the liability assumed by the contract of the stockholder, to contribute his ratable share or "so much thereof *as is necessary to satisfy the debts of the company*" (Chapter 76, General Statutes, Section 5909).

The proper manner of collecting this liability was under consideration in Harper vs. Carroll, 66 Minn., 487, where the Court held that in the equity proceedings contemplated by Chapter 76, the Court after determining the necessity of an assessment, should render judgment against each stockholder for the full amount of his liability, and should collect only so much thereof as was actually necessary for the payment of the debts, in the following manner (quoting from the opinion, at page 495):

> "The court should, by the terms of the judgment, reserve judicial control over the issue of execution. The judgment should provide for issuing execution on the order of the court, at first for each stockholder's *pro rata* share of the corporate debts and the expenses of this action, and then for the issue on the order of the Court of subsequent successive executions for such additional *pro rata* amounts or assessments as shall be found necessary by reason of the failure to collect from stockholders found to be insolvent in attempting to satisfy the prior executions. When the corporate indebtedness and costs and expenses of the action are paid in full, the balance of the judgment against those stockholders paying their full share for the same shall be satisfied."

This method of action carefully protected the stockholder's right to have his liability confined to so much as was absolutely necessary to pay the debts. How different is the pro-

ceeding upon which it is now sought to hold the plaintiff in error, whereby the Court, without the presence of the particular stockholder, and without hearing him, has assessed an arbitrary amount against his stock, an amount that for all that appears in the declaration may be far in excess of the stockholder's *pro rata* share of the amount actually required to pay the debts; and directs the receiver to sue the stockholder in his home State for the entire amount so assessed. The judgment here sued upon does not even pretend to determine that the payment of this amount will be required for the purpose for which the stockholder, by his original contract, agreed to pay. It determines only that in the opinion of the Court it is a proper amount and will "probably" be required.

(4) IT NOT ONLY ALLOWS THE COURT TO COLLECT THE PROPORTIONATE SHARE WHICH THE COURT THINKS MAY BE REQUIRED FOR "PROBABLE DEBTS" AND "PROBABLE EXPENSES," BUT DIRECTS THE COURT TO TAKE INTO ACCOUNT THE "PROBABLE SOLVENCY OR INSOLVENCY OF STOCKHOLDERS AND THE PROBABLE EXPENSES OF COLLECTING THE ASSESSMENT"; SO THAT THE STOCKHOLDER IS TO BE COMPELLED TO PAY A SUM IN EXCESS OF HIS PROPORTIONATE SHARE WITHOUT ANY WARRANT OF LAW, EXCEPTING THE DETERMINATION OF THE MINNESOTA COURT, MADE IN HIS ABSENCE, THAT SOME OF THE OTHER STOCKHOLDERS MAY TURN OUT TO BE INSOLVENT, AND THEREFORE AN EXCESSIVE AMOUNT IS LIKELY TO BE REQUIRED.

On this point, the New York Supreme Court well said in *Converse vs. Stewart*, 105 App. Div., 478, at page 486:

> "The injustice in this case is striking, for here this defendant is not only held liable for his proportion of the debts of the corporation, but is also held to be liable for the proportion of those debts which the court in Minnesota has assumed to be payable by the stockholders of the corporation who are insolvent; and there is also imposed upon this defendant liability for the amount that the receiver will have to pay in enforcing the liability of this defendant and other solvent stockholders. The court of Minnesota assumed to impose

this liability upon the defendant by virtue of the statute of that State passed in 1899, many years after the defendant had abandoned his stock in this corporation."

(5) IT ADDS TO THE LIABILITY OF THE STOCKHOLDERS LIABILITIES INCURRED BY THE CORPORATION AFTER IT HAS BEEN PUT INTO LIQUIDATION BY THE COURT.

There is a material difference between a liability incurred by the corporation as a going concern for which the stockholders are properly liable, and the liability which some receiver may be incurring while the corporation is in liquidation, and which is a different class of debts than that for which stockholders are answerable. The new act makes the stockholder liable indiscriminately for all claims which may be proved in such liquidation proceedings.

(6) IT ADDS TO THE LIABILITY OF STOCKHOLDERS, LIABILITIES OF THE CORPORATION OTHER THAN DEBTS.

The former act provides for an assessment of stockholders only "if the property of such corporation is insufficient to discharge its *debts*" (Chapter 76, General Statutes, Section 5909). The new act provides for the appropriation of the assessment levied to the payment of "all indebtedness of *and claims against* said corporation proved or allowed in said proceedings (Act of 1899, Section 11). This adds to the liabilities assumed by the stockholder to pay the debts of the corporation, a liability to pay any claims against it, as, for example, for torts or claims for damages of any kind, not incurred in the regular course of the corporation's business.

(7) IT CHANGES THE ENTIRE NATURE OF THE LIABILITY FROM ONE ENFORCEABLE BY AN EQUITY PROCEEDING AGAINST ALL STOCKHOLDERS TO ONE ENFORCEABLE BY AN ACTION AT LAW BY THE RECEIVER AGAINST ANY STOCKHOLDER INDIVIDUALLY.

That this difference is not a mere difference in the remedy, but is a change in the nature of the liability itself, is clearly established by the authorities cited below.

(8) IT DEPRIVES THE STOCKHOLDERS OF THEIR RIGHT TO BE HEARD REGARDING THE CLAIMS OF CREDITORS AS WELL AS OF THE RIGHT TO VESTED DEFENSES AGAINST SUCH CLAIMS.

The new act provides that the assessment shall be fixed upon such proofs as may be offered as to the probable indebtedness and expenses (Sec. 3), and provides for using the amount contributed for "the payment of all the expenses of such assignment or receivership, and all indebtedness of and claims against said corporation proved or allowed in said proceedings" (Sec. 11). The proceedings referred to are "assignment or receivership proceedings" (Secs. 1, 2).

No provision is made for making stockholders parties to such assignment or receivership proceedings, but they are conducted as are such proceedings everywhere else, without the presence of stockholders. No provision is made for bringing in stockholders as parties, until the assignee or receiver, or a creditor whose claim is filed, shall present a petition showing the necessity of proceedings against stockholders (Sec. 2).

This contemplates that before such petition is presented, the claims against the corporation must have been presented and passed upon, and the subsequent determination with the stockholders as parties (assuming that the act makes them parties at all) is only as to the probable aggregate amount of the debts and expenses (Section 3). Thus the stockholder is given no opportunity of testing or questioning any claim against the corporation that may be presented, or having it determined whether it is a claim of such a nature as to make the stockholders liable for it.

There is another serious infringement on the rights of stockholders: the stockholders, who are liable directly to creditors for debts of the corporation, may have many defenses against claims, which, for one reason or another, may not be available to the corporation itself—for example, *ultra vires*, the statute of limitations, release to stockholders and many others that will readily come to mind. Such a defense, assuming it to be pleadable by the corporation, in any given case, the corporation may have waived, or may be estopped from asserting, without thereby binding the stockholders individually, yet by the new statute stockholders are made liable indiscriminately for all claims which may be allowed, in their

absence, against the corporation, in the assignment or receivership proceedings.

The vested right of stockholders to contest the claims of creditors under the former statute is well recognized. The proceedings, as has already been pointed out, were in the nature of a suit in equity, to which all creditors and all stockholders were parties from the beginning. Any claim asserted by any creditor could be contested by any party to the suit, and particularly by any stockholder.

In *National German American Bank vs. St. Anthony, etc., Co.*, 61 Minn., 359, it was held that the proper practice in an action under Chapter 76 was to bring stockholders in as parties defendant at the start; but if plaintiff failed to do so, any other creditor might come in and file a complaint and have the stockholders brought in as parties defendant.

In *Pioneer Fuel Co. vs. St. Peter Street Improvement Company*, 64 Minn., 386, it was held that in an action under Chapter 76 the stockholders made defendants must plead to the complaint, but need not plead to the claim of each creditor, and said, regarding the claims of creditors, at page 388:

> "These petitions or proofs of claim are *sui generis*; and it is not necessary for the defendant stockholders, or any other party to the action, to answer or reply to them, but they stand denied by all parties, and must be proved on the trial, unless expressly admitted."

In *Oswald vs. Minneapolis Times Co.*, 65 Minn., 249, the claims of creditors were contested by a defendant stockholder.

In *Palmer vs. Bank of Zombrota*, 72 Minn., 266, it was held that judgment should be rendered only in favor of those creditors who have proved their claim in the proceedings against stockholders.

In *Helm vs. Smith-Lee Co.*, 76 Minn., 328, 331, it was held that in an action under Chapter 76 each creditor's claim is deemed to be controverted and he must prove his claim.

(9) IT PRESCRIBES ONE FORM OF REMEDY FOR RESIDENT STOCKHOLDERS, BEING AN EQUITABLE PROCEEDING TO WHICH THEY ARE PARTIES, AND ANOTHER FORM OF REMEDY FOR NON-RESIDENT STOCK-

HOLDERS, BEING AN ACTION AT LAW, WITH PRACTICALLY ALL QUESTIONS CONCLUSIVELY DETERMINED AGAINST THEM.

The right to bind non-resident stockholders is more fully considered in Point III., *infra*.

(10) IT PERMITS A CONCLUSIVE JUDGMENT TO BE RENDERED AGAINST A NON-RESIDENT STOCKHOLDER IN PROCEEDINGS TO WHICH HE IS NOT A PARTY.

This question is more fully considered under Point III., *infra*.

It is well established by a long line of decisions that changes so material, nay, radical, as these, impair the obligation of the contract and cannot be upheld.

This question in the case at bar is not complicated by any reserved right to alter, amend or repeal corporate charters, as no such right is reserved by the Constitution or statutes of Minnesota. Any material alteration in the nature or extent of the liability impairs the obligation of the contract. As was said in *Green vs. Biddle*, 8 Wheat., 1, at page 84:

> "The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, by postponing, or accelerating, the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

Nor can the impairment of a contract be justified by the claim that the change is only in the remedy, where the change in the remedy is such as to affect the substance of the liability. An impairment of the obligation of a contract is clearly unconstitutional, though it be under the guise of a mere change in the remedy. The question always is: Is the change merely a matter of procedure, or does it affect the rights of the parties?

The leading case on this point is *Bronson vs. Kinzie*, 1 How., 311. In that case Chief Justice TANEY said, at page 316:

> "Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract. But if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case it is prohibited by the Constitution."

To the same effect is *Planters' Bank vs. Sharp*, 6 How., 301, 330.

These cases were followed in *Von Hoffman vs. City of Quincy*, 4 Wall., 535, where the Court said at page 552:

> "Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfillment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement' (Sturges v. Crowninshield, 12 Wheat., 257). The prohibition has no reference to the degree of impairment. The largest and least are alike forbidden."

And in *Edwards vs. Kearzey*, 96 U. S., 595, the Court said at page 607:

> "The remedy subsisting in a State when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is, therefore, void."

This case was followed and its doctrine reiterated in *Seibert vs. Lewis*, 122 U. S., 284, 294. The same doctrine was reaffirmed in *Barnitz vs. Beverly*, 163 U. S., 118, where it was held that a statute authorizing the redemption of property sold upon foreclosure of a mortgage where no right of redemption previously existed, or extending the period of redemption over the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Illustrations of cases where the change was only in the procedure, and was therefore held not prohibited are *Fourth National Bank vs. Francklyn*, 120 U. S., 747, 755, where the statute provided for enforcing the double liability of stockholders by an execution against the stockholder, and it was held legal to substitute for such execution, an action of debt against the stockholder, in which he was permitted to avail himself of any defence which the corporation could have interposed; and *Hill vs. Merchants' Mutual Insurance Company*, 134 U. S., 515, where, instead of an action in equity against a stockholder to enforce his liability for unpaid stock subscriptions, it was held lawful to substitute a provision for summoning him in connection with the proceedings against the corporation itself, and obtaining judgment in that action.

But in the case at bar, the change relates not merely to the steps to be taken in the proceedings. The new act, as has already been pointed out, changes the entire nature of the liability from a liability to all the creditors generally, enforceable only in an action in equity at the corporate domicile with all stockholders and creditors as parties, to a liability which can, as to non-resident stockholders, be fixed by proceedings to which they are not parties, and of which they have received no notice, and permits the liability so fixed to be enforced by an action against any one stockholder by a receiver in a court of law at the domicile of the stockholder. It changes the liability of stockholders from a liability to creditors for the deficiency in corporate assets for the payment of debts, and substitutes a liability to a receiver of the corporation for all claims against the corporation, whether debts or otherwise, for all the costs and expenses of the receivership, and for the commissions of the receiver; and not content with this, it adds an additional liability for an estimated probable indebt-

edness for estimated probable insolvencies of other stockholders and for estimated probable expenses of collecting the assessment against solvent stockholders—in short, it leaves the entire question of the amount to be paid by stockholders not subject, as heretofore, to a fixed legal criterion, but subject only to the arbitrary discretion of the court. It deprives stockholders of the right heretofore vested in them to contest the claims of creditors, and to require their judicial establishment as against stockholders, and deprives them of vested defenses to such claims, and subjects them to all claims which may be made against the corporation, whether incurred during the life of the corporation or after its practical dissolution, and whether or not they would, under the former statute, have been claims for which the stockholders were liable.

Changes so radical as these have been uniformly condemned by the courts.

In *Dexter vs. Edmands*, 89 Fed., 467, the distinction was considered between a mere change in procedure and a change which goes to the substance. A creditor of a Kansas corporation brought suit in the United States Circuit Court for Massachusetts against a stockholder residing in Massachusetts, to enforce the double liability imposed by the Constitution and laws of Kansas. The defendant contended that whether the action was against one stockholder at law, or against all stockholders in equity, was a mere matter of remedy, governed by the *lex fori*, and as the latter form of action alone was permitted in similar cases in Massachusetts, the former could not be there proceeded with, though expressly conferred by the laws of Kansas. Judge LOWELL, who heard the case, held otherwise, saying, at pages 468, 469 :

> " The distinction between remedy and substantive right is incapable of exact definition ; indeed, the difference is somewhat a question of degree (Cooley, Constitutional Limitations, 285; Pritchard v. Norton, 106 U. S., 124, 132). The constitution of Kansas has laid down a general principle, to wit, that stockholders shall be individually liable to the corporation's creditors for an additional amount equal to their stock. This right of the creditors of the corporation to collect their debts

from its stockholders, in order to obtain enforcement, needs not only a remedy, but needs also particularization before it can have a definite meaning. Paragraph 1192 does much more than provide a remedy for the right which is given by the Constitution. Indeed, the paragraph is chiefly concerned with particularizing and more fully defining that right which in the Constitution is stated in general terms. Paragraph 1192 provides that each stockholder shall be liable individually to each creditor who holds an execution against the corporation which has been returned *nulla bona*. Now, the difference between a right vested in all the creditors to proceed in one action against all the stockholders, and a right vested in each individual creditor to proceed against any individual stockholder, is more than a difference between two remedies; *it is a difference between two substantive rights*. The latter right the plaintiff is trying to enforce in this suit, while the defendant is trying to make him put up with the former right. Whether the later right shall be enforced by an action of debt, or of assumpsit, by a special action on the case, by an action authorized by some code, or even by a bill in equity, may be a question of remedy, to be determined by the *lex fori*. If, however, the statute of Kansas gives the individual plaintiff a substantive right to proceed against the individual defendant, and if this substantive right is in any way enforceable in this court, it must be admitted, I think, that the form of action in this case has been well chosen."

The converse of this proposition was decided in *State National Bank vs. Sayward*, 91 Fed., 443, where it was held that the double liability of stockholders in an Ohio corporation, much like the liability in this case, was enforceable only by an action in equity with all parties in court, and could not be enforced in the United States Circuit Court for Massachusetts by bill against stockholders residing in that State. The Court said:

"Somewhat anomalous and arbitrary remedies, like that existing in the constitution and statutes of the State of Kansas, have been upheld and enforced in the

Federal Courts, largely *upon the ground that the stockholder submitted himself to the operation of the remedy and contracted with the public in respect to it. It could perhaps be said with consistency that creditors, on the other hand, who dealt with the corporation and voluntarily contract, are bound by the disabilities and conditions prescribed by the government creating the corporation ;* and Railway Co. v. Gebhard, 109 U. S., 527–537, would seem to justify the position that creditors and members of the public who deal with a corporation are bound by the remedy and the liability prescribed, together with the disabilities, if any, under the laws of the State creating the corporation and prescribing the remedy. The doctrine of Railway Co. v. Gebhard, *supra*, which is applied to foreign creditors, must be accepted as fairly applying to home creditors, like the plaintiff in this case, who, it must be held, presumed upon the reasonable scope of the local right and the local remedy. If, therefore, the question is the lack of efficiency in the remedy prescribed by the Statute of Ohio * * * it would seem, upon reason, that *the rule which would hold the stockholder to an arbitrary and anomalous remedy, on the ground of contract, should hold the creditor to an insufficient and practically inoperative remedy upon the same ground.*"

The same question came up in *Western National Bank vs. Reckless*, 96 Fed., 70, 78, as a question of constitutional law. The court there had under consideration an act of New Jersey passed in 1897, which provided that no liability of stockholders created by the laws of any other State could be enforced otherwise than by an equity action for an accounting. It was held that this law was unconstitutional, so far as it affected the right of an existing creditor of a Kansas corporation to bring an action against a stockholder who had acquired his stock before the enactment of the statute, in the form authorized by *Dexter vs. Edmands, supra.* The Court there said :

"Nor do we think that the act of 1897, which forbids the maintenance of an action at law in behalf of an

individual creditor against an individual stockholder, but apparently sanctions a proceeding in the nature of an accounting in equity, in which all the creditors of the foreign corporation and all its stockholders should be necessary parties, merely changes the form of the remedy theretofore existing, without destroying the substantial right of action which the plaintiff had for the enforcement of its contract."

The Court then quoted from the opinion of Judge LOWELL in *Dexter vs. Edmands.*

In *Evans vs. Nellis*, 101 Fed., 920, the court held unconstitutional a law of Kansas passed in 1899, which provided that the double liability of stockholders, which had been theretofore enforced by action by any one judgment creditor against any one stockholder, should, thereafter, be enforceable by a receiver, to be appointed for the purpose of recovering both the liability on stock subscriptions and the double liability of stockholders, for the benefit of all the creditors. The Court, after pointing out that the defendant could, before the amendment, have defended himself against any judgment, and could have compelled contribution from the other stockholders, says :

"The new law wrought a sweeping and radical change. New liabilities are created and new remedies are provided. * * * Under the former law the stockholder's additional liability was an obligation to pay the judgment creditor who was unable to collect his debt from the corporation. Under the present law this liability is an asset of the corporation for the benefit of all the creditors. Under the former law the right to collect his judgment rested with the judgment creditor. He could act immediately. Nothing but his own laches could impair this right. Under the latter law the judgment creditor has no advantage over the most negligent and supine contract creditor. All alike must trust to the discretion of the receiver ; and if he fails in duty the debt of the judgment creditor is lost. In the one case the entire indebtedness of the stockholder was applied without diminution upon the judgment. In the

other case the entire amount collected may, by order of the court, be devoted to the payment of the receiver's commissions, costs and expenses. * * * *It is not difficult to suppose a case where a stockholder absolutely safe from pursuit under the former act may be financially ruined under the present act.*"

The question passed upon in this case as to the constitutionality of the Kansas Law of 1899, was certified to this Court for its determination, but this Court held that the receiver had not met the requirements of the law itself, and could not sue, and it was therefore unnecessary to pass upon the constitutional questions, which this Court expressly left open (*Evans vs. Nellis*, 187 U. S., 271).

The Kansas Act of 1899 was again before the Courts in *Webster vs. Bowers*, 104 Fed. Rep., 627, and again held unconstitutional. The Court said :

" The specific remedy provided by the Statute of 1868 for the enforcement of the constitutional liability of the stockholder to the creditor was a part of the contract. A subsequent statute, withdrawing such remedy, and substituting one of a different nature, and one designed to enforce the stockholder's liability for the benefit of the corporation and of all the creditors, would, in operation, impair the obligations of the pre-existing contract and the substantive rights of the plaintiff. The fact that the remedy provided by the later statute is, on general principles, more in harmony with the justice of a situation like the one in question, does not justify the impairment of the plaintiff's contract with the stockholder. To change a remedy, or to invent or to provide new procedure for the enforcement of an individual right, without impairment thereof, and within a limited time, is one thing, and to this extent the authorities hold that we may go ; but to change the remedy, and provide for an enforcement of the right for the benefit of others, is quite another and different thing, and to that extent we may not go. *The later statute wisely provides for the appointment of a receiver to enforce all liability, and to wind up insolvent*

*corporations for the benefit of all the creditors, and may well apply to subsequent contracts made in reliance thereon, but, notwithstanding its just and comprehensive provisions in this respect, it must be held as not operating upon pre-existing contracts.* To hold the plaintiff to the later remedy, to the exclusion of the one existing at the time of his contract, would at once impair his rights, and in the event that the view of some authorities should prevail, that a receiver cannot maintain an action extraterritorially for the enforcement of such rights, though appointed under a statute for that purpose, would destroy it altogether."

In *Knickerbocker Trust Co. vs. Meyers*, 133 Fed. Rep., 765, the court held unconstitutional a law passed by Maryland in 1904, which provided that the liability of stockholders to creditors, which formerly could be enforced by an action at law, could thereafter be enforced against resident stockholders only by an action in equity, to which non-residents could, at their election, make themselves parties. The Court said:

"The liability assumed by the defendant in becoming a stockholder, according to the law as it stood at the time he took stock in the corporation in question, in March, 1900, as well as in April, 1903, when the loan was obtained by it from the plaintiff company, was in the nature of a contract with prospective creditors, and could not as such be impaired in any essential part by state legislation. It ran, moreover, as we have seen, directly from the stockholder to the creditor. And the obligation thus became a part of every contract, debt and engagement of the corporation, as much as if severally made with the stockholder himself. If this be so, it is difficult to see how the statutory changes to which reference has been made, and on which the defendant relies to escape responsibility, can be sustained. The attempt is made to do so on the ground that they affect the remedy only, and not the right, but this far from appreciates the radical differences in the results brought about. The stockholder may be liable to the same pecuniary extent as before, but the manner in

which it is worked out is entirely changed. Instead of being answerable to the creditors severally, of which each is entitled to avail himself by separate action against any responsible stockholder, according to his own convenience, wherever found, and with respect to which, as between creditors, it is a race of diligence the first to sue being entitled to appropriate the whole until fully paid—the liability of the stockholder is to creditors, generally and ratably, to be enforced by bill in the courts of Baltimore, to which all are virtually constrained to resort. *This is much more than a variation of remedies. It is a difference in substantive rights* (Dexter v. Edmands, 89 Fed., 169; Western National Bank v. Reckless, 96 Fed., 270; Webster v. Bowers, 104 Fed. R., 622; Woodworth v. Bowles, 61 Kans., 569). The contract which the creditor had with each stockholder, as though written into the bond, has been cut up by the roots, and it is idle to suggest that anything like an equivalent has been given in its place."

In the light of these authorities, it is submitted, the act of 1899 clearly makes such changes in the liability as impair the obligation of the contract, and is unconstitutional and void.

## II.

**The act of 1899 impairs the obligation of the contract with the creditors and deprives them of property, without due process of law, by taking the right of action to enforce the liability of stockholders from the creditors and giving it to a receiver.**

That the liability assumed by the stockholders was one directly to the creditors and not to the corporation, and one

that could not be enforced by the corporation or its receiver, has been shown above. So far as creditors were concerned, their right to collect this liability became a part of the contracts which they respectively entered into when their respective debts were incurred. That right the act of 1899 assumed to take away from them and to vest, without their consent, in a receiver who represents primarily not the creditors, but the corporation.

In taking the right away from the creditors and giving it to the receiver, the law also devotes the fund to a purpose which was not within the contemplation of the original contract. It provides that the stockholders' liability may be used, not only as theretofore to pay the debts owing to the creditors, but also the expenses and commissions of a receiver of the corporation, appointed without the consent of the creditors or of the stockholders.

On the principles discussed in Point I., *supra*, it is submitted that the statute in these respects clearly contravenes the provisions of the Constitution of the United States.

It may be argued that the present objection is one which belongs to the creditors themselves, and which cannot be raised by the stockholders, under the rule that only the party aggrieved can raise the objection of the unconstitutionality of an act of the legislature. That rule, however, has no application to the case at bar. The stockholders are aggrieved as well as the creditors. If the objection is a valid one in the mouth of a creditor, then the act and all proceedings thereunder are void and of no effect as to him. It follows that if the stockholders' objection were disregarded, and judgment were rendered against him, despite his protest, in a proceeding under the act of 1899, and paid by the stockholder, a creditor who had not been a party to the proceeding, might forthwith institute another proceeding under the old law. In such proceeding the judgment and payment by the stockholder would be no defense, for as to the creditor the entire proceeding would be void.

To say therefore that the objection may be taken by a creditor and not by a stockholder would lead to the absurdity of subjecting the stockholder to a liability to pay twice as much as he contracted to pay.

It is submitted that the language of the Court in *Evans vs.*

*Nellis*, 101 Fed., 920, is applicable to this case. The Court there said :

> " It is true that a law will not ordinarily be declared unconstitutional on the objection of one whose interests are not injuriously affected by the objectionable features. If the accusations against the act in question were only those which might be presented by the judgment creditors, whose rights have manifestly been invaded, there might be more difficulty in declaring it invalid. There are, however, exceptions to the general rule which are stated by Judge COOLEY to be found in cases ' where it is evident from a contemplation of the statute and of the purpose to be accomplished by it, that it would not have been passed at all, except as an entirety, and that the general purpose of the legislature will be defeated if it shall be held valid as to some cases and void as to others ' (Cooley on Constitutional Limitations, 4th Ed., 219). It would, indeed, be a strange anomaly if the statute in question were held valid when attacked by stockholders and invalid when attacked by judgment creditors. Such a construction would lead to endless confusion and injustice. But, as has been seen, the contractual rights of the stockholders have been impaired equally with those of the judgment creditors. It is undoubtedly true that whatever belongs merely to the remedy may be changed as the legislature may direct, but the court cannot believe that this familiar rule is applicable to a law which makes such fundamental changes in the terms of the contract."

## III.

**The act of 1899 deprives stockholders of property without due process of law, by authorizing a conclusive judgment against non-resident stockholders who have not been served with process.**

The only notice to stockholders provided for by the act is that on the petition being filed the Court "shall direct such notice of such hearing to be given by the party presenting said petition, *by publication or otherwise*, as the Court in its discretion may deem proper" (Section 2). The act provides, "Said order and the assessment thereby levied shall be *conclusive* upon and against all parties liable upon or on account of any stock or shares of said corporation, *whether appearing or represented at said hearing or having notice thereof or not*, as to all matters relating to the amount of and the propriety of and necessity for the said assessment" (Section 5). Section 6 provides that it shall be the duty of the assignee or receiver to bring an action against every stockholder for the amount so assessed against him.

In the case at bar, plaintiff in error was not served with process, and the only notice served on it was notice by publication. It is not alleged in the declaration that the plaintiff even knew of the pendency of the proceedings. It is stated that a copy of the order was mailed to the plaintiff in error, but not that it was received by it.

Under these circumstances, it is submitted that the plaintiff in error was not a party to the proceedings, and they were not binding upon it.

(A) *It is well settled by the decisions of this Court that in order to constitute due process of law, personal notice and a hearing is essential.*

In the absence of this requirement, no jurisdiction is acquired to render a binding judgment. Any statute providing for the rendering of a binding judgment without this requirement is unconstitutional and void, except as to such persons

as expressly assent to its provisions, and so become bound thereby.

In *D'Arcy vs. Ketchum*, 11 How., 165, a partnership was sued in New York, and judgment rendered on personal service on one partner, under the statute of that State, providing that the judgment should be *prima facie* evidence of the liability of the partner not served. It was held that an action could not be brought on the judgment in Louisiana against a partner who was not personally served in the New York action.

This decision was followed in *Mason vs. Eldred*, 6 Wall., 231, where the principle was thus stated by FIELD, J., at page 239:

> "The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded."

The same principles were laid down in *St. Clair vs. Cox*, 106 U. S., 350, 353.

The leading case on the point more particularly in issue here is *Pennoyer vs. Neff*, 95 U. S., 714, which held that a judgment against a non-resident obtained on service by publication is not due process of law, and is not enforceable elsewhere. The Court there said, per FIELD, J., at pages 733–4:

> "Except in cases affecting the personal status of the plaintiff, and cases in which that mode of service may be considered to have been assented to in advance, as hereinafter mentioned, the substituted service by publication, allowed by the laws of Oregon and by similar laws in other States, where actions are brought against non-residents, is effectual only where, in connection with process against the person for commencing the action, property in the State is brought under the control of the court, and subjected to its disposition by process adapted to that purpose, or where the judgment is sought as a means of reaching such property or affecting some interest therein; in other words, where the action is in the nature of a proceeding *in rem*. As

> stated by Cooley in his Treatise on Constitutional Limitations, 405, for any other purpose than to subject the property of a non-resident to valid claims against him in the State, '*due process of law would require appearance or personal service* before the defendant could be personally bound by any judgment rendered.'"

That decision has been followed and applied by the Supreme Court of Minnesota. In *Cabanne vs. Graf*, 87 Minn., 510, that Court held, on the principles just stated, that a statute providing for service on a partnership doing business in the State by service of process on an agent within the State, is unconstitutional.

In *Bardwell vs. Collins*, 44 Minn., 97, the Court held unconstitutional a statute providing for service of a summons by publication on resident defendants; and in *Smith vs. Hurd*, 50 Minn., 503, 506, the Court applied the same principle to service by publication on a non-resident.

A recognized exception to the rule requiring personal service is a case where such mode of service is assented to in advance. An example of this is found in *Lafayette Insurance Co. vs. French*, 18 How., 404, where it was held that a foreign insurance company which had, as a condition of entering the State, agreed to be bound by process served in a particular manner, could not claim that such service was insufficient to afford jurisdiction.

In *Pennoyer vs. Neff*, *supra*, the Court said, at pages 735, 736:

> "Neither do we mean to assert that a State may not require a non-resident entering into a partnership or association within its limits, or making contracts enforceable there, to appoint an agent or representative in the State to receive service of process and notice in legal proceedings instituted with respect to such partnership, association or contracts, or to designate a place where such service may be made and notice given, and provide, upon their failure to make such appointment or to designate such place, that service may be made upon a public officer designated for that purpose, or in some other prescribed way, and that judgments rendered upon such

> service may not be binding upon the non-residents, both within and without the State. As was said by the Court of Exchequer in Valler v. Dumergue, 4 Exch., 290, 'It is not contrary to natural justice that a man who has agreed to receive a particular mode of notification of legal proceedings should be bound by a judgment in which that particular mode of notification has been followed, even though he may not have actual notice of them.' See, also, The Lafayette Ins. Co. v. French, 18 How., 404, and Gillespie v. Commercial Mutual Marine Insurance Co., 12 Gray, 201. Nor do we doubt that a State, on creating corporations or other institutions for pecuniary or charitable purposes, may provide a mode in which their conduct may be investigated, their obligations enforced, or their charters revoked, which shall require other than personal service upon their officers or members. Parties becoming members of such corporations or institutions would hold their interest subject to the conditions prescribed by law. Copin v. Adamson, L. R., 9 Exch., 345."

Such consent, when given, is to be strictly construed, and cannot be availed of beyond its limits. *National Exchange Bank vs. Wiley*, 195 U. S., 257.

In the case at bar, no element of consent is present, as is more fully shown under subdivision B, *infra*.

(B) *The claim is without foundation, which is made on behalf of the receiver, that while stockholders not served with process were not personally parties to the proceeding, they were represented by the corporation, and are therefore bound by the proceeding.*

This contention is not borne out by the authorities. The doctrine that the corporation represents its members has been limited strictly to those matters in which the corporation was acting as the agent for the persons whom it sought to bind.

This principle is well illustrated by the decision in *Holland vs. Duluth Iron Mining & Development Co.*, 65 Minn., 324, where stockholders in a Minnesota corporation were held to be bound by a judgment rendered against a corporation in the course of its business. The reason why stockholders are

bound by such a judgment is thus stated by the Court, at page 331:

> "As the statutory or constitutional liability is an obligation voluntarily assumed by the stockholder when he subscribes for his shares, the officers of the corporation represent him as to that liability to the same extent as they do when his ordinary liability assumed by the same act of subscription is involved. The officers of the corporation, in the absence of fraud and collusion, can bind the stockholders and fasten upon them obligations which cannot be questioned by the latter. The officers cannot only make the corporation liable to the full extent of the corporate assets, but they can also fasten the statutory or constitutional liability upon the stockholders. This liability is incident to taking the stock, and is incurred by the subscriber when subscribing for his shares, and entering into the organization, and he undertakes the responsibility for the result of *litigation in which the corporation becomes involved*, to which he is not a party, and has not been given an opportunity to defend personally. He is then represented by officers who are not only *authorized to take charge of all litigation*, but whose duty it is so to do; and why should not *those whom the officers represent* be held privies in interest and concluded by the result, in the absence of fraud and collusion?"

On this principle also are based the more recent decisions holding stockholders bound by a call for stock subscriptions made in their absence. The earlier decisions on this point related to assessments in bankruptcy proceedings, and were held binding on the stockholders because the proceeding was one *in rem*, and therefore fell within one of the exceptions in which personal service is dispensed with.

Sanger vs. Upton, 91 U. S., 56, 59.
New Lamp Chimney Co. vs. Ansonia Brass & Copper Co., 91 U. S., 656, 661, 662.
Pullman vs. Upton, 96 U. S., 328.
Graham vs. Boston, etc., R. R. Co., 118 U. S., 161, 179.

Subsequent cases on the same point arose where the call on shareholders' subscriptions was made by a court of equity. In these cases it was held that the shareholders had expressly authorized the directors of the corporation to make such call without personal notice; and that in the insolvency proceedings the court succeeded to this right of the corporation.

Hawkins vs. Glenn, 131 U. S., 319.
Great Western Telegraph Co. vs. Purdy, 162 U. S., 329, 336, 337.
Furnald vs. Glenn, 56 Fed., 373, 375, 376.

*Hawkins vs. Glenn, supra*, is the leading case on this point. Chief-Justice FULLER, speaking for the Court, there stated in the following words the reasons of the Court for holding the call binding upon stockholders:

> "But it is said that a binding assessment cannot be levied without the presence of the stockholders or service of process or notice upon them.
>
> "*Under the charter of the company* a call might only be made by the president and directors, and was *a corporate question merely*, and in the situation of the company's affairs it was a duty to make it, failing the discharge of which by the president and directors, creditors could set the powers of a court of equity in motion to accomplish it.
>
> "Executing in that regard *a corporate function for a corporate purpose*, it is difficult to see upon what ground it could be held that the court could not order an assessment operating upon stockholders, who would be bound if the president and directors had ordered it.
>
> "Sued after such an order of the court, the defendant does not deny the existence of any one of the facts upon which the order was made, but contends that there has been no call as to him, because he was not a party to the cause between creditor and corporation. We understand the rule to be otherwise, and that the stockholder is bound by a decree of a court of equity against the corporation in enforcement of a corporate duty, although not a party as an individual, but only through representation by the company."

This decision was followed in *Great Western Telegraph Company vs. Purdy, supra*, where Mr. Justice GRAY, speaking for the Court, at page 336, further elucidates the reasoning upon which that decision is based, as follows:

> "The order of that court was in effect, as it was in terms, simply a 'call or assessment' upon all stockholders who had not paid for their shares in full. It was such as the directors might have made before the appointment of a receiver; and in making it the court, having by that appointment assumed charge of the assets and affairs of the corporation, took the place and exercised the office of the directors."

A further statement of the reasons for these decisions is found in the opinion in *Furnald vs. Glenn, supra*, at page 375, as follows:

> "What the stockholders thus owe is what they or their predecessors in the holding of the stock have agreed to pay; that is, the full amount of the par value of the stock, less what has been paid. If the corporation continued in control of its assets, though it has ceased to do business, may not its board of directors call the full amount? Can the stockholder, in such case, as a defence to the action thereon, object that the call is larger than the amount of the debts makes necessary? When the court acts in the stead of the directors, may it not call the full amount unpaid without violating the rights of stockholders?"

The holding of these decisions is, briefly stated, no more than this: the balance unpaid of stock subscriptions is a debt from the stockholders to the corporation, payable on demand by the corporation; when a receiver of the corporation is appointed, the court and the receiver who take charge of the assets of the corporation, and have the right to collect them, may make the demand which the corporation could have made, and the right to do so can be as little questioned by the stockholder as could the right of the corporation itself.

But here the question is not of any debt to the corpora-

tion. The liability here involved, as has been amply demonstrated, is to the creditors, not to the corporation. The corporation has nothing to do with it. The receiver of the corporation cannot collect it.

The claim of the receiver in the case at bar to collect this liability is, as will appear in Point IV., *infra*, made, not in the right of the corporation, but on the claim that the receiver represents the creditors. It follows that the corporation is in no sense acting as the agent or representative of the stockholders with respect to their individual liability, and cannot bind them by its presence.

Even assuming that the double liability were a matter as to which the corporation might in any case represent or bind the stockholders by its appearance in litigation, it could not bind them by an appearance in litigation instituted after it had ceased business and gone into liquidation.

> Schrader vs. Manufacturers' National Bank, 133 U. S., 67.

But it has uniformly been held that a corporation in no sense represents the stockholders, where the subject matter of the litigation is not a corporate liability or corporate transaction, in which the corporation is authorized to act for them, but is a matter concerning some individual liability or transaction of the stockholders themselves.

It was never claimed by the Courts of Minnesota that as to such matters, the corporation ought to or did represent the stockholders. The decisions are all to the contrary.

In *Willius vs. Mann*, 91 Minn., 494, the Court says, at pages 503, 504:

> "It is true that, in proceedings against a corporation, the corporation, when duly summoned and brought into court, represents the stockholders; and all stockholders, in so far as the interests and affairs of the corporation are concerned, are bound by the judgment of the court. But the stockholders are not bound by any such judgment as respects their individual interests or liability. The proceedings under consideration for the reorganization of the bank were, in effect, proceedings *in rem*, and in no way involved the per-

> sonal liability of the stockholders for the debts of the bank; and the judgment in that proceeding cannot have the effect of binding them in their individual capacity."

In *Ward vs. Joslin*, 186 U. S., 142, this Court held that, despite the provisions of the laws of Kansas to which the stockholders had assented, and by virtue of which, as is shown below, they were represented by the corporation in the proceedings, yet that the stockholders, notwithstanding the judgment against the corporation, could nevertheless defend against an *ultra vires* contract of the corporation.

The distinction between matters in which the corporation represents the stockholder, and matters in which it does not represent him, was thus stated in *Andrews vs. National Foundry & Pipe Works*, 76 Fed., 155, 172:

> "There is privity, of course, between a corporation and its shareholders, in respect to corporate rights and liabilities, and it results necessarily that a judgment or decree against a corporate body is conclusive upon the owners of stock in respect to their rights as shareholders. In other words, such judgment or decree is not open to collateral attack by a shareholder for the purpose of asserting or protecting his interests as a shareholder (Sanger v. Upton, 91 U. S., 56; Graham v. R. R. Co., 118 U. S., 161; Hawkins v. Glenn, 131 U. S., 319; Glenn v. Leggitt, 135 U. S., 533; Bennett's Executors v. Glenn, 55 Fed. Rep., 956). But we know of no case that holds, and on principle we think it cannot be maintained, that in respect to rights arising out of contracts other than subscriptions for stock a shareholder can be bound by a judgment or judicial proceeding against the corporation to which he was not in fact a party."

In *Stephens vs. Fox*, 83 N. Y., 313, the Court pointed out the distinction between the shareholder's interest in the corporate affairs and his individual liability, and cited as two instances of the latter kind the case of *Miller vs. White*, 50 N.

Y., 137, and *McMahon vs. Macy*, 51 N. Y., 155, and said concerning these cases:

> "In those cases the defendant was not pursued as a debtor to the corporation, or for any pre-existing liability of his own, but upon an original liability created by the statute, and *it was not in the power of the corporation to admit away his case*, or suffer a recovery which should be binding upon him and create, as against him, a liability to which he was not previously subject."

These principles have been applied by the New York Supreme Court to the very cause of action here asserted. In an action brought in that Court by the defendant in error here, to recover against a stockholder of the same corporation residing in New York, upon the same cause of action as that here sued upon, the court held that the corporation did not represent the stockholders, and that a non-resident stockholder, not a party to the proceedings, was not bound thereby.

Converse vs. Stewart, 105 App. Div., 478.

The reasoning of the Court is clear and convincing. The following is from the opinion, at page 485:

> "I do not think it could be said that he was represented by the corporation who was a party to that proceeding. The liability sought to be enforced was not a liability to the corporation, or because of any contract, express or implied, that he had made with the corporation. The liability may be said to be contractual in its character, the obligation being assumed when a stockholder acquired stock in the Minnesota corporation. The corporation of which he was a stockholder was not his representative or trustee in relation to this liability, nor, as I understand it, was the plaintiff's right to enforce the obligation acquired by reason of any assignment or transfer by the corporation. The plaintiff seeks to enforce an obligation, contractual in its nature, which a stockholder assumed by

becoming the owner or holder of stock in the corporation, for the benefit of the creditors of the corporation. The receiver's right to enforce that liability, as I understand it, depends upon his representing the creditors of the corporation, and acting as trustee for them, and not by virtue of any right he acquired from the corporation. But assuming that the receiver became entitled to enforce the obligation by reason of his succeeding to the rights of the corporation, the corporation was then an adverse party to the stockholders against whom the liability was sought to be enforced, and the court certainly could not acquire jurisdiction as against the stockholder by making the adverse party a party to the proceeding.

"It seems to me that a stockholder against whom such a liability is sought to be enforced is entitled to his day in court, and to insist that the facts upon which the liability is sought to be enforced shall be established by competent evidence as against him, in an action to which he is a party, and where the court seeking to enforce the liability has jurisdiction over him."

All the cases which counsel have been able to find in which a stockholder has been held to be represented by the corporation, and bound with reference to his individual liability by proceedings taken in his absence, were cases in which the statutes in force at the time when the stockholder subscribed for his stock provided that he might be so bound, and, consequently, he assented, as part of his contract, to be bound in that manner.

The decisions in *Hancock National Bank vs. Farnum*, 176 U. S., 640; *Chicago, etc., Bridge Co. vs. Anglo-American Packing & Provision Co.*, 46 Fed. Rep., 584, 587; *Dexter vs. Edmands*, 89 Fed. Rep., 467, so held with reference to the liability under the Constitution and laws of Kansas. As was stated by Judge LOWELL in the case last cited, at page 471:

"The case of Hawkins v. Glenn (*supra*), as I understand it, decides that the effect of a judgment against a corporation shall in a suit to enforce the liability of its stockholders, be determined by the laws of the state

> ' where the corporation dwelt, *in reference to whose laws the stockholders contracted*, and in whose courts the creditors were compelled to seek the remedy accorded.' "

The same was held with reference to the liability under the laws of the State of Washington, in *Sheafe vs. Larimer*, 79 Fed., 921; *Howarth vs. Ellwanger*, 86 Fed., 54, 55.

In *Corry vs. Baltimore*, 196 U. S., 466, the stockholders of a corporation were held to be represented by the corporation in proceedings to impose a tax upon the capital stock, upon the ground, thus stated by Mr. Justice WHITE in the opinion :

> " *The condition attached by the Maryland Law to the acquisition of stock in its domestic corporations*, that the stockholders for the purpose of notice of the assessment of the stock and proceedings for the collection of the valuation thereof, shall be represented by the corporation, is not, in our opinion, an arbitrary and unreasonable one, when it is borne in mind that the corporation, through its officers, *is, by the voluntary act of the stockholders, constituted their agent*, and vested with the control and management of all the corporate property, that which gives value to the shares of stock, and in respect to which the taxes are but mere incidents in the conduct of the business of the corporation."

In *Hale vs. Calder*, 113 Fed. Rep., 670, it was held that non-resident *creditors* of a Minnesota corporation were bound by notice by publication on the ground that they had expressly assented to such mode of service upon them. The Court said :

> " The question then arises whether, as creditors of the corporation, the defendants submitted themselves to the laws of Minnesota, which provide for notice by publication. On page 764, 95 Federal Reporter, in the opinion in Hale v. Hardon, it was said :
>
> " ' The Minnesota statute (Sec. 5911) provides for calling in all the creditors, and the creditors *have by contract submitted their rights to the operation of such provision of law of the corporate domicile.*'

> " In view of this it would seem that this court, despite arguments to the contrary, must apply in this case the rule that *these creditors, in dealing with the corporation, have assented to this provision making publication due notice to them.*"

In all these cases, the statute permitting notice by publication was in force when the contract was made, and the decisions properly proceeded on the ground of assent to that provision as a part of the contract.

In the case at bar there was no such assent. There never was, either at the time when the plaintiff in error made this contract, nor at any time before the enactment of the act of 1899, any provision in the laws of Minnesota for binding non-resident stockholders without personal service. On the contrary, the decisions are uniform to the effect that non-resident stockholders not made parties were not bound by the proceedings.

In *Commercial Bank of St. Paul vs. Azotine Manufacturing Co.*, 66 Minn., 413, the Court said, at page 416, concerning a proceeding under Chapter 76 of the General Statutes :

> " Findings as to the amount of shares of stock held by non-resident stockholders, over whom the court had acquired no jurisdiction, or any determination as to their liability, would have been useless, for no one would have been bound by such findings."

In *Hale vs. Allinson*, 188 U. S., 56, the decisions of the Minnesota courts were reviewed, and it was held that proceedings under Chapter 76 of the General Statutes were not binding on non-resident stockholders. The following is from the opinion of the Court :

> " In the first place, all the non-resident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made on one of them, and, as the suit was not one in which service by publication of process could be ordered, there was nothing in the nature of the suit to give them notice or to enable the

court to give judgment against them without their appearing. The court did not assume to give any such judgment. Indeed, the complaint averred there were no means of obtaining jurisdiction over the non-resident stockholders, and the court assumed that it had no jurisdiction over them, and, on account of such lack of jurisdiction, it only gave judgment against those resident stockholders who were parties to the suit. The complainant claims that the non-resident stockholders are bound because the corporation was a party, and not because they were parties to the suit. There is no decree or judgment, therefore, against the stockholders who were non-residents. The claim that they are bound by certain findings of fact by the court, because of the corporation being a party, and in law representing them to that extent, assuming if for this purpose to be well founded, is far from transforming a decree against resident stockholders into one against non-residents who were not parties to the action."

The same was held in *Finney vs. Guy*, 189 U. S., 335.

In *Hale vs. Hardon*, 89 Fed., 283, the court, holding to the same effect, pointed out the distinction between a case of the kind now under consideration, and the case before this Court in *Hawkins vs. Glenn*. The court said, at page 286:

> " In Hawkins v. Glenn the liability sought to be enforced was for a call or assessment which could have been lawfully made by the corporation itself, to have been lawfully followed by a suit in its name. It is true, an assessment was laid by order of the court; but the proceeding at law was technically in behalf of the corporation, through its representative assignee or trustee. The rule of the case is best summed up in Telegraph Co. vs. Purdy, at pages 336 and 337, 162 U. S. It was, in effect, that the court, acting through the trustee, had all the powers of the corporation to make assessments on shareholders who had not fully paid for their shares; that the court, in making assessments, took the place and exercised the voice of the directors; and that such assessments, unless set aside by appropriate judicial

> proceedings, afford conclusive evidence of the necessity therefor, and to that extent bind every stockholder, even without personal notice to him. There is much else said in the opinion in Hawkins v. Glenn, but the real pith of the case, and the only proper conclusions which it contains, are as we have explained."

The Court then proceeds to cite from the opinion of this Court in *Great Western Telegraph Co. vs. Purdy, supra*, and continues at page 289 :

> "As the defendant was not within the jurisdiction of the local courts, the entire proceeding, including the determination of the amount of the debts of the corporation * * *, the adjudication of liability * * * and the appointment of the plaintiff as a so-called receiver, was *coram non judice*, so far as this defendant was concerned. The expressions otherwise in Hanson v. Davison, 76 N. W., 254 * * * are not in harmony with the run of the adjudications of the federal courts."

This decision was reversed in *Hale vs. Hardon*, 95 Fed., 747, which was itself overruled by the decision of this Court in *Hale vs. Allinson, supra*, but all the Judges who wrote in the Circuit Court of Appeals concurred in the main with the principles expressed in the opinion in the court below, regarding the effect of the judgment on non-resident stockholders; and, as has been shown, those principles were reaffirmed by this Court in *Hale vs. Allinson.*

The proceeding in the case at bar, based upon the authority of the act of 1899, is brought for the purpose of binding the plaintiff in error by a judgment rendered in a proceeding to which it was not a party, and the claim of the right so to bind it was based on service by publication, and on the presence of the corporation.

But the stockholders did not consent to be bound by either of these modes of proceeding; and, in the absence of their consent, neither was sufficient to constitute due process of law. It follows that the statute and the proceedings thereunder, so

far as non-resident stockholders are concerned, are absolutely void, and that this action, based solely on such proceedings, cannot be maintained.

## IV.

**The plaintiff as receiver has not such title as can give him the right to maintain this action; and such title could not be conferred upon him without impairing the obligation of the contract and depriving the creditors of property without due process of law.**

It is now so decisively settled by the decisions of this Court that a receiver cannot, by virtue of the authority conferred upon him by his appointment, maintain an action in the federal courts in any jurisdiction other than that in which he was appointed, that argument or discussion on this point is needless.

Booth vs. Clark, 17 How., 322.
Hale vs. Allinson, 188 U. S., 56.
Great Western Mining Co. vs. Harris, 198 U. S., 561.

To consider the authorities in the various state courts on the question would be of no value. As this Court said in the case last cited, per DAY, J.:

> "There are numerous and conflicting decisions in the state courts as to the rights of a receiver to sue in a foreign jurisdiction upon principles of comity, which it is not necessary to review here. In this court, since the case of Booth v. Clark, 17 How., 338, we deem the practice to be settled, and to limit a receiver who derives his authority from his appointment as such, to actions, either in his own name or that of an insolvent corporation, such as may be authorized within the jurisdiction wherein he was appointed."

This Court has also held that each State must determine for itself in what cases it will allow a foreign receiver to sue in the state courts (*Finney vs. Guy*, 189 U. S., 335). But in this Court the rule has been settled as stated above, that the only case in which a foreign receiver is allowed to sue in the federal courts is a case where he sues, not as receiver at all, but as the owner of the property or the chose in action which is the subject matter of the litigation. This apparent exception, which a moment's reflection will show to be no real exception at all, is thus stated in the Harris case:

> "There are exceptional cases, such as Relfe v. Rundle (Life Asso. of America v. Rundle), 103 U. S., 222, in which *the entire property of the insolvent company was vested in the superintendent of insurance* of the state, where his authority did not come from the decree of the court, and his right to sue was maintained. In Hawkins v. Glenn, 131 U. S., 319, it appeared that Glenn *had derived title by assignment and deed*, and he was permitted to sue. In the case now before us, it does not appear that the receiver had any other *title* to the assets and property of the company than that derived from his official relation thereto as receiver under the order of the court."

In *Relfe vs. Rundle*, 103 U. S., 222, the case referred to as embodying an exception to the rule, the Statute of Missouri provided:

> "Upon the rendition of a final judgment dissolving a company, or declaring it insolvent, all the assets of such company *shall vest in fee simple and absolutely* in the superintendent of the insurance department of this State, and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company, and such other persons as may be interested in such assets."

In that case, it was held that the superintendent of insurance could sue on the indebtedness due to the corporation,

not because of his official position, but because he had become vested with title to the chose in action upon which the action was brought. The Court said, at page 225:

> "Relfe is not an officer of the Missouri State court, but the person designated by law to take the property of any dissolved life insurance corporation of that State, and hold and dispose of it in trust for the use and benefit of creditors, and other parties interested. The law which clothed him with this trust was, in legal effect, part of the charter of the corporation. He was the statutory successor of the corporation for the purpose of winding up its affairs. As such he represents the corporation at all times and places in all matters connected with his trust. He is the trustee of an express trust, with all the rights which properly belong to such a position."

And at page 226 the Court said:

> "*The appellees, when they contracted with the Missouri corporation, impliedly agreed that if the corporation was dissolved under the Missouri laws, the superintendent of the insurance department of the State should represent the company in all suits instituted by them affecting the winding up of its affairs.* Relfe, therefore, became, by operation of law, the successor of the corporation in the litigation these appellees instituted in Louisiana."

In the case at bar, there was no such agreement on the part of the creditors or stockholders. On the contrary, as has been seen, it had long been settled that the receiver had absolutely no interest in the double liability of stockholders, which was an asset belonging, not to the corporation, but to the creditors.

The situation is in this respect no different from what it was in *Hale vs. Allinson, supra,* where the Court said:

> "There is no transfer of any right or title to a receiver to enforce the liability (certainly not as to non-

> resident stockholders), nor is it a case where any assignment of such right by the creditors has been made, so that the receiver is, in fact, an assignee of the persons interested in the recovery from the stockholders."

It is not claimed that any assignment has been made by the creditors to the receiver in the case at bar. The act of 1899 does not make the receiver an assignee of the rights of the creditors, but merely provides that when authorized by the court so to do, the receiver may bring actions to recover on the liability of stockholders. This simply authorizes the court to permit its officer to bring such actions, but it does not give him such extra-territorial power as the court itself could not give under the authorities cited above.

But, even assuming that the statute intended to make the receiver an assignee of the rights of the creditors, it is submitted that it could not effect that purpose, at least as to existing corporations, and creditors and stockholders thereof whose rights had become fixed before the statute was passed. It could not take the right of action away from the creditors, and give it to a receiver without their consent, by any statutory contrivance, without impairing the contract of the creditor and of the stockholder, and taking away the creditors' property without due process of law.

The cases upon which the defendant in error relies were cases where, as in *Relfe vs. Rundle*, all parties had contracted with reference to a statute then existing, which provided that in certain cases the receiver should become vested with title to the cause of action, and so had assented in advance to a transfer of that right by operation of law. Such were the cases of *Howarth vs. Angle*, 162 N. Y., 179; *Howarth vs. Ellwanger*, 86 Fed., 54; and *Howarth vs. Lombard*, 175 Mass., 570. These cases all arose out of the Washington statute. While it is believed that the construction of that statute, as vesting the receiver with title to the cause of action, is not sound, yet, assuming that construction to be correct, the decisions in these cases rest, and can be sustained, only on the ground that the statute was in existence at the time when the contract was made, and that all parties impliedly assented to the transfer of title to the receiver in the manner provided in the statute.

As was stated in *Howarth vs. Lombard, supra :*

> " *The stockholders must be assumed to have understood the statute from the first as it has been construed by the court. They must be assumed to have agreed that on the insolvency of the corporation a receiver might be appointed* by the court and the affairs of the corporation administered and the amount of its assets and liabilities determined and the deficiency ascertained under order of the court, and an assessment to meet this deficiency made ratably upon all who were then stockholders."

In the case at bar there was no such agreement, but the law was directly the contrary at the time when the contract was made. The act of 1899 assumes to change entirely the rights of the parties without their consent, and this, it is submitted, the State of Minnesota has no power to do.

## V.

**The decree overruling the demurrer should be reversed, and the cause remanded with instructions to sustain the demurrer.**

Respectfully submitted,

LAURENCE ARNOLD TANZER,

~~LESTER H. STRAWN,~~

Of Counsel for Plaintiff in Error.

FILE COPY.

IN THE

# Supreme Court of the United States,

October Term, A. D. 1905.

White Supreme Court U. S.
FILED
DEC 30 1905
JAMES H. McKENNEY,
Clerk

First National Bank of Ottawa, Illinois,
Plaintiff in Error,
v.
Theodore R. Converse, Receiver of the Minnesota Thresher Manufacturing Company,
Defendant in Error.

No. 176.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

## BRIEF FOR PLAINTIFF IN ERROR.

LESTER H. STRAWN,
For Plaintiff in Error.
WINSTON, PAYNE & STRAWN,
Of Counsel.

OTTAWA, ILL.:
REPUBLICAN-TIMES PRINTING HOUSE.
1905.

IN THE

# Supreme Court of the United States,

OCTOBER TERM, 1905.

No. 176.

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FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
*Plaintiff in Error,*
v.
THEODORE R. CONVERSE, RECEIVER OF THE MINNESOTA THRESHER MANUFACTURING COMPANY,
*Defendant in Error.*

In Error to the Circuit Court of the United States, for the Northern District of Illinois.

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## BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

*May it please the Court:*

### ABSTRACT OF THE CASE.

This is an action of assumpsit under common law pleadings, brought by the receiver of the Minnesota Thresher Manufacturing Company, defendant in error, against the First National Bank of Ottawa, Illinois, plaintiff in error, to enforce a statutory liability claimed to exist under the laws of the state of Minnesota, against plaintiff in error as a holder of capital stock of the Minnesota Thresher Manufacturing Company, a corporation organized under the laws of Minnesota and doing business in that state.

The laws of Minnesota provided for what is commonly known as the double or added liability of stockholders. The constitution provided:

"Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

The General Incorporation Act provided:

"That each stockholder in any corporation heretofore or hereafter formed or organized, under any of the laws of this state, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him for corporate debts hereafter contracted." (Statutes of Minnesota, 1878, p. 395, Sec. 111.)

Chapter 76 of the Acts of 1878 and 1894 is printed on pages 2 and 3 of Mr. Tanzer's brief, and chapter 272 of 1899 is printed on pages 3 to 9 of the same brief.

Defendant in error began suit in the Circuit Court of the United States for the Northern District of Illinois, and filed a praecipe and declaration in the case May 23, 1904. Various proceedings, not material to this Court, were had until on January 24, 1905, defendant in error, by leave of Court, filed his amended declaration, which is set forth on pages 5 to 16 of the transcript of record herein.

January 28, 1905, plaintiff in error filed its demurrer to said amended declaration, said demurrer being both general and special, and is set forth on pages 17 and 18 of the transcript.

Clauses 3, 4, 5 and 6 of the demurrer specifically claimed that the supposed laws of Minnesota on which the liability

of plaintiff in error is predicated in the declaration are in contravention of the constitution of the United States. This demurrer was overruled January 28, 1905, thus bringing the case on writ of error within the jurisdiction of this court, not only for the purpose of determining the Federal question, but all questions raised by the assignments of error.

THE AMENDED DECLARATION

Alleges in substance that Theodore R. Converse, as receiver of the Minnesota Thresher Manufacturing Company, complains of the First National Bank of Ottawa, Illinois, in assumpsit: For that whereas, plaintiff is a resident and citizen of Minnesota, residing at Stillwater, in said state, and defendant is and was a corporation organized and existing under the laws of the United States and a citizen and resident of Illinois, residing at Ottawa, in said state.

That November 26, 1884, in Minnesota, the Minnesota Thresher Manufacturing Company was duly incorporated under the laws of Minnesota, and has since existed under said laws; that its articles of incorporation provide that the objects were the purchase of the capital stock, evidences of indebtedness issued by, and the assets of the North Western Manufacturing and Car Company, or any portion of the same, and the manufacture and sale of steam engines and all kinds of machinery, in St. Paul, Minnesota, changed by amendment to Stillwater, Minnesota, and that said articles have never been modified except as aforesaid.

That the capital stock of said Thresher Company was $7,000,000, divided into 140,000 shares of the par value of $50 each, divided into preferred stock $4,000,000 and common stock $3,000,000, of which has been issued and are now

outstanding 27,967 shares of preferred stock, and 42,594 shares of common stock.

That May 6, 1901, the Merchants' National Bank of St. Paul recovered a judgment against the Thresher Company in the District Court of Ramsey county, Minnesota, a court of general jurisdiction, for $2,936.07, which is still unsatisfied; that May 25, 1901, an execution was issued which was returned June 5, 1901, *nulla bona;* that an alias execution was also issued and returned *nulla bona* in June, 1901.

That at the time said judgment was entered, and for a long time prior thereto, and at all times thereafter, said Thresher Company was, and now is, wholly insolvent and without any assets or property whatsoever. (Rec., p. 7.)

That August 15, 1901, said Merchants' National Bank commenced in the District Court of Washington county, Minnesota, a court of general jurisdiction, an action against the Thresher Company under chapter 76 of the General Statutes of Minnesota, and acts amendatory thereof, for the sequestration of the stock, property and effects of the Thresher Company, and for the appointment of a receiver for the same, and that said Thresher Company appeared in said action on the next day by its duly authorized attorney, and judgment was entered at once (August 16, 1901), adjudging that the stock, property, things in action and effects of said Thresher Company be sequestered, and that a receiver therefor be appointed; that such judgment has never been modified; that August 16, 1901, plaintiff was appointed receiver of all the property, assets, rights and interests of said Thresher Company with full authority and direction to sue for, collect, recover, compromise or settle any and all stockholders' liability, and all expenses of administration, in-

cluding fees, allowances and expenses of said receiver and his counsel; that plaintiff qualified as such receiver and is still acting as such.

That September 3, 1901, an order of said District Court was entered requiring creditors to exhibit their claims and that certain creditors intervened and exhibited their claims, which were, on December 11, 1902, allowed to the amount of $443,752.17, which remain unpaid; that the capital stock paid in and all property and assets of said Company have been exhausted.

That at the time of the organization and incorporation of said Thresher Company, and at the time defendant became a stockholder and ever since, it was provided by the constitution and general laws of Minnesota "that each and every stockholder of said corporation severally assume liability for the indebtedness of said corporation in case of deficiency or insufficiency of corporate assets to liquidate such indebtedness, to the amount of the par value of the stock so owned by said stockholder."

That prior to August 16, 1901, and about January 1, 1885, defendant became the owner and holder of 274 preferred shares of the capital stock of said Thresher Company of the aggregate par value of $13,700, as follows:

That prior to May 10, 1884, the North Western Manufacturing & Car Company was engaged in manufacturing at Stillwater, Minnesota, and was a debtor of defendant; that on May 10, 1884, the District Court of Washington county, Minnesota, appointed a receiver for said corporation and its property; that about November 26, 1884, said defendant, together with other creditors and certain stockholders of such corporation, organized a new corporation,

the same being said Thresher Company, and that said Thresher Company exchanged its preferred stock at par for the claims of creditors of the North Western Manufacturing & Car Company, and exchanged its common stock for the preferred stock of the Car Company, and October 27, 1887, purchased at judicial sale the remaining assets of said Car Company, paying for the same in part with claims so acquired by it; and that defendant exchanged its claims against said Car Company for its 274 shares of preferred stock of said Thresher Company and is still the owner thereof.

That at the time defendant became the owner of said 274 shares the constitution and laws of Minnesota hereinbefore set forth were in full force and effect and became a part of defendant's contract of purchase, and defendant by said purchase contracted that it would be responsible with other stockholders for all contracts, debts and engagements of said Company to the amount of its stock.

The declaration then sets forth in full the Minnesota Act of 1899, chapter 272. (Rec., pp. 10 to 12.)

In brief, the Act provides that whenever a corporation of Minnesota whose stockholders are liable to creditors shall make an assignment for the benefit of creditors, or whenever a receiver for any such Company has been or shall be appointed, the District Court appointing such receiver may upon petition of the receiver or of any creditor, appoint a time for hearing, and direct notice of such hearing to be given by publication or otherwise, as the Court may deem proper. At such hearing the Court shall consider such proofs by affidavit or otherwise as may be offered as to the probable indebtedness of said corporation and expenses of

receivership, and probable amount of assets available for the payment of such indebtedness and expenses, and as to what parties are liable as stockholders, and if it appears that the ordinary assets will probably be insufficient to pay without delay such indebtedness and expenses, the Court shall levy a ratable assessment on all parties liable as stockholders for such amount as it may deem proper, and direct the payment to the receiver, and direct the receiver to collect the same.

Said assessment shall be conclusive upon all parties liable on account of shares of stock, whether appearing at said hearing or having notice thereof, or not, as to all matters relating to the amount of, and the propriety of and necessity for said assessment. It shall be the duty of the receiver to institute actions against parties who fail to pay the assessment in this or any other state.

The declaration then avers that April 16, 1902, plaintiff presented a petition to said District Court praying that it levy such ratable assessment upon the stockholders pursuant to the provisions of the Act of 1899; that on the same day the Court entered an order that notice be given by publication or mailing, and that a copy was duly mailed to defendant; that the petition was heard December 10, 1902, and was contested by certain stockholders, and that December 22, 1902, the Court entered an order which is set forth in full in the declaration. (Rec. 13-15.)

In brief, the order finds that the petition was duly filed pursuant to the Act of 1899; that the receiver appeared and that certain stockholders (naming them, but not including defendant) filed written objections; that due notice of said hearing was given and mailed to each stockholder as direct-

ed by said order; that evidence was heard at the hearing; and it appearing to the satisfaction of the Court that it is necessary and proper that an assessment of $18.00 per share of said capital stock be levied; therefore it is ordered that an assessment of 36 per cent. of the par value of each share of the capital stock be assessed against each of said shares, and that each stockholder be directed to pay the same within 30 days to the receiver, and that the receiver proceed to collect the same, and to institute suits for that purpose in this state, or elsewhere, and that the receiver give notice of this order by mailing a copy of the same within 10 days to each stockholder.

Said declaration then avers that said order has never been modified; that said receiver duly gave said notice to said defendant January 3, 1903, whereby defendant under the laws of Minnesota became liable to pay to plaintiff $4,932.00 with interest thereon at the rate of 6 per cent. per annum from January 21, 1903. In consideration whereof defendant promised to pay plaintiff said sum of money last aforesaid, on request, but, though requested, has not paid the same; to the damage of plaintiff $10,000.

THE DEMURRER.

Defendant filed a demurrer to the amended declaration. Such demurrer was both general and special. The specific causes of demurrer were stated as follows:

(1) It does not state facts sufficient to constitute a cause of action against the defendant.

(2) It does not show that plaintiff has legal capacity to institute and maintain the present action.

(3) It shows that said supposed laws of Minnesota for

1899 are in contravention of clause 1 of section 10 of article 1 of the constitution of the United States.

(4) It shows that said supposed laws of Minnesota of 1899 are in contravention of the fourteenth amendment of the constitution of the United States.

(5) It shows that said supposed laws of Minnesota for 1899, being "An Act to provide for the better enforcement of the liability of stockholders of corporations," are in contravention of the constitution of the United States.

(6) It shows that said supposed laws of Minnesota for 1899 unjustly discriminate against non-resident stockholders and are such as will not be enforced in this jurisdiction.

(7) It shows that the supposed order of the Court levied an assessment on stockholders that is excessive and beyond reason.

(8) It does not show that the supposed corporate indebtedness is contractual or that it has been judicially determined as against this defendant.

(9) It does not show that all the necessary steps prescribed by the supposed laws of Minnesota have been taken.

(10) It shows as a basis of liability, supposed acts of the defendant which are *ultra vires* and void under the national banks act.

(11) It states conclusions of the pleader instead of facts.

(12) It does not allege a case within the jurisdiction of this Court.

(13) It is in other respects, uncertain, informal and insufficient. (Rec. 17-18.)

JUDGMENT BELOW.

The Court below ordered that said demurrer to said amend-

ed declaration be overruled, to which ruling defendant excepted and elected to stand by its demurrer. Whereupon the Court rendered judgment in favor of the plaintiff and against the defendant for the sum of $4,932.00 with interest at the rate of 6 per cent. per annum from January 21, 1903, to date, making the total damages $5,529.60, together with costs taxed at $39.10, and awarded execution; to which defendant then and there objected and excepted. (Rec. 19, 20.)

Thereupon on the same day defendant filed a petition for a writ of error claiming the right to remove said judgment to this Court and at the same time filed with said petition its assignment of errors, in which assignment the following points were specified:

ASSIGNMENT OF ERRORS.

(1) The Court below erred in overruling the demurrer of plaintiff in error to the amended declaration filed herein on the 24th day of January, 1905.

(2) The Court below erred in not sustaining the demurrer filed herein on the 28th day of January, 1905, to the said amended declaration.

(3) The amended declaration filed herein on the 24th day of January, 1905, and upon which judgment was rendered, does not support the judgment.

(4) The Court erred in rendering a judgment in favor of the defendant in error and against the plaintiff in error.

(5) The Court below erred in not holding that the supposed laws of Minnesota for 1899, are in contravention of the constitution of the United States.

(6) The Court below erred in holding that plaintiff

might recover interest, and in including interest in said judgment rendered herein, and in giving judgment in favor of the plaintiff and against the defendant for too great an amount.

(7) The said judgment was given in favor of said Theodore R. Converse, receiver of the Minnesota Thresher Manufacturing Company, defendant in error, whereas by the laws of the land it ought to have been given in favor of the First National Bank of Ottawa, Illinois, plaintiff in error. (Rec. 22.)

Wherefore plaintiff in error prayed that said judgment might be reversed.

The case is in this Court by writ of error.

## BRIEF.

### I.

The basis of this suit is an adjudication of the District Court of Washington County, Minnesota, in a case where plaintiff in error was not a party.

The adjudication of said Court cannot be made the basis of recovery in Illinois against plaintiff in error when the Minnesota Court had no jurisdiction over it.

*Converse v. Stewart*, 105 App. Div. (N. Y.) 478.

### II.

The Minnesota Court had no jurisdiction over plaintiff in error because it was not a party to the suit, did not appear in it, had no notice of it prior to the adjudication, had not consented to notice by publication or mail, had not consented that it should be represented by the receiver or the corporation, and its interests were not represented by the receiver or the corporation. There was no "due process of law."

*Converse v. Stewart*, 105 App. Div. (N. Y.), 478.
*Schrader v. Bank*, 133 U. S., 67, 77; 33 L. ed., 564.
*Hale v. Allinson*, 188 U. S., 56; 47 L. ed., 380.
*Chase v. Curtis*, 113 U. S., 452; 28 L. ed., 1038.
*Finney v. Guy*, 189 U. S., 335; 47 L. ed., 839.
*Ward v. Joslin*, 186 U. S., 142; 46 L. ed., 1093.
*Godfrey v. Terry*, 97 U. S., 171; 24 L. ed., 944.
*Brunswick Term. Co. v. Nat. Bank*, 192 U. S., 396; 48 L. ed., 491.
*Hale v. Harden*, 95 Fed. Rep., 747, 788 (5).
*Hale v. Harden*, 89 Fed. Rep., 283.
*Chestnut v. Pennall*, 92 Ill., 55.

*Great West. Tel. Co. v. Barker*, 56 Ill. App., 402.
*Kincaid v. Dwinelle*, 59 N. Y., 548.
*Howarth v. Angle*, 162 N. Y., 179; 56 N. E. R., 489; 47 L. R. A., 725, 729.
*Stephens v. Fox*, 83 N. Y. 313.
*Danforth v. Chemical Co.*, 68 Minn., 308.
*Willins v. Mann*, 91 Minn., 494.
*Commercial Bank v. Azotine Mfg. Co.*, 66 Minn., 413.

III.

When it appears from the articles of association that the real and only purpose of the organization of the corporation is the carrying on of a manufacturing or mechanical business, and such other business as may be incidental thereto, the shareholders are exempt from the constitutional and statutory additional liability.

*Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn., 28.
*Cowling v. Zenith Iron Co.*, 65 Minn., 263.
*Cuyler v. City Power Co.*, 74 Minn., 22.
*Senour Mfg. Co. v. Church Paint Co.*, 81 Minn., 294.

IV.

"The statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot therefore be enforced to pay damages recovered against the corporation in an action in tort."

1 Cook on Corporations (3 ed.), Sec. 217, and cases cited.
*Chase v. Curtis*, 113 U. S., 452; 28 L. ed., 1038.

V.

Under the laws of Minnesota in force when the Minnesoto Thresher Manufacturing Co. was incorporated, the contract of subscription made by the defendant, and the corporate indebtedness incurred, a receiver was not a proper party to enforce the statutory liability of stockholders.

1 Cook on Corporations, 5th ed., Sec. 218.
*Allen v. Walsh*, 25 Minn., 543.
*Minn. Base Ball Co. v. Bank*, 66 Minn., 441.
*Boothe v. Clark*, 17 Howard, 322.
*Hale v. Allinson*, 188 U. S., 56; 47 L. ed., 380.
*Finney v. Guy*, 189 U. S., 335; 47 L. ed., 839.
*Great West. M. & M. Co. v. Harris*, 198 U. S., 561; 49 L. ed., 1163.

VI.

"Where, by a statute, every creditor has the right to bring suit to enforce the stockholders' liability, a subsequent statute taking away this right and giving it to a reeciver, is unconstutional."

1 Cook on Cor., 5th ed., Sec. 218, pp. 439 to 441.
2 *Id.*, Sec. 497.
*Woodworth v. Bowles*, 61 Kan., 569.
*Evans v. Nellis*, 101 Fed. Rep., 920.
*Barnitz v. Beverly*, 163 U. S., 118; 41 L. ed., 93.
*Webster v. Bowers*, 104 Fed. Rep., 627.
*Savings Bank v. Warren*, 52 Mich., 557.
*Western Nat. Bank v. Reckless*, 96 Fed. Rep., 70.
Knickerbocker v. Meyers, 139 Fed. Rep., 111.

VII.

Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract; but if that

effect is produced, it is immaterial whether it is done by acting on a remedy or directly on the contract itself; in either case it is prohibited by the constitution.

*Richardson v. U. S. Mortgage Co.*, 194 Ill., 259, 266.
*Fisher v. Green*, 142 Ill., 80.
*Field v. Brokaw*, 148 Ill., 654.
*Edwards v. Kearzey*, 96 U. S., 595; 24 L. Ed., 793.
*Tenn. v. Snead*, 96 U. S., 69; 24 L. ed., 610.

VIII.

The rights and obligations of all parties accruing under the law as defined by the highest court of the state will not be effected by a different course of judicial decisions subsequently rendered.

*Loeb v. Trust. Columbia Twp.*, 179 U. S., 472, 492; 45 L. ed., 280.
*Rowan v. Runnels*, 5 How., 134; 12 L. ed., 85.
*Douglass v. Pike County*, 101 U. S., 677; 25 L. ed., 968.
*Taylor v. Ypsilanti*, 105 U. S., 60; 26 L. ed., 1008.
*Anderson v. Santa Anna Twp.*, 116 U. S., 356; 29 L. ed., 633.

IX.

The amended declaration alleged that the stock was subscribed and the obligation assumed about January 1, 1885.

At that time the Supreme Court of Minnesota held that an action in equity by a creditor in which all parties interested should be joined, was the sole remedy, and that its purpose was the payment of the debts of the corporation.

*Allen v. Walsh*, 25 Minn., 543, 556.

X.

The amended declaration alleged that under the laws of Minnesota each stockholder "assumed liability for the indebtedness of said corporation in case of deficiency or insufficiency of corporate assets to liquidate such indebtedness, to the amount of the par value of the stock so owned by each stockholder." (Rec. 9.)

The pleader is bound by this statement of the liability.

XI.

The liability in question must be either penal or contractual. If penal, it will not be enforced in another state. If contractual and has once accrued, it cannot be changed by subsequent legislation. The constitution and laws of Minnesota became a part of charter granted in 1884. As between the state and stockholders the charter is a contract protected by the constitution of the United States.

2 Cook on Corporations, Sec. 495.
*Dartmouth College v. Woodworth*, 4 Wheat., 518.
*Wilmington R. R. Co. v. Reid*, 13 Wall., 264.
*Zabriski v. Hackensack R. R. Co.*, 18 N. J. Equity, 178.

XII.

Neither the constitution nor the general statutes of Minnesota in 1884 reserved any right to amend the charter.

A statute passed subsequent to the granting of a charter increasing the liability of a stockholder is void unless the Legislature has reserved the right to amend the charter.

2 Cook on Corporations, Sec. 497.

XIII.

The Minnesota Act of 1899 added to the liability of stockholders for the debts of the corporation, the expenses of receivership and thereby vastly increased the liability. It contravenes the constitution of the United States in the following particulars:

(1) It adds to the liability of stockholders the costs and expenses of receivership.

*Converse v. Stewart*, 105 App. Div. (N. Y.), 475.
*Richmond v. Irons*, 121 U. S., 27, 65; 30 L. ed., 864, 876-7.
*Evans v. Nellis*, 101 Fed. Rep., 920-3.
*Woodworth v. Bowles*, 61 Kan., 569.

(2) It permits the courts to estimate the probable indebtedness and collect it of stockholders, although the creditors may never file their claims therefor.

*Richmond v. Irons*, 121 U. S., 27, 66; 30 L. ed., 864, 877.

(3) It adds to the liability of stockholders, liabilities incurred by the corporation after it has been put into liquidation by the Court.

*Converse v. Stewart*, 105 App. Div. (N. Y.), 475.
*Richmond v. Irons*, 121 U. S., 27, 60; 30 L. ed., 864, 875.
*Schrader v. Bank*, 133 U. S., 67; 33 L. ed., 564.
*Hale v. Harden*, 95 Fed. Rep., 747, 788 (8).
*Danforth v. Chemical Co.*, 68 Minn., 308.

(4) It adds to the liability of stockholders, liabilities accruing against the corporation by reason of matters other than contracts, such as liabilities for torts, or *ultra vires* acts and liabilities not incurred in the ordinary course of business.

I. Cook on Corporations, 5th Ed., Sec. 217.

*Child v. Boston, etc., Works,* 137 Mass., 516; 50 Am. R., 328.
*Chase v. Curtis,* 113 U. S., 452; 28 L. ed., 1038.
*Ward v. Joslin,* 186 U. S., 142; 46 L. ed., 1093.
*Evans v. Nellis,* 101 Fed. Rep., 920.
*Bohn v. Brown,* 33 Mich., 257.
*Schrader v. Bank,* 133 U. S., 67; 33 L. ed., 564, 567.
*Chestnut v. Pennell,* 92 Ill., 55.
*Richmond v. Irons,* 121 U. S., 27, 60; 30 L. ed., 864.

(5) It permits a conclusive judgment to be entered against a non-resident without due process of law. (See cases cited under head II.)

(6) It permits an unreasonable and an unnecessarily large assessment (to pay debts and expenses that are only problematic) in an *ex parte* proceeding, to be conclusive on a non-resident stockholder.

*Evans v. Nellis,* 101 Fed. Rep., 920, 927.

(7) It prescribes one form of remedy for resident stockholders, being an equitable proceeding to which they are parties, and another form of remedy for non-resident stockholders, being an action at law with practically all questions conclusively determined against them.

*Hale v. Harden,* 95 Fed. Rep., 747, 788 (6).

(8) It deprives the stockholder of defenses which may have become absolute, such as the statute of limitations, release, extension of time by creditors, set-off, etc.

I. Cook on Corporations, 5th Ed., Secs. 216, 225.
*Evans v. Nellis,* 101 Fed. Rep., 920.
Cooley's Constl. Lim., 365.

(9) It changes the liability from one that could only be enforced in Minnesota by creditors to one that can be enforc-

ed by a receiver in another state. (See cases cited under head III.)

(10) It deprives the stockholders of their right to be heard on the claims of creditors and the insolvency of other stockholders.

*Danforth v. Chemical Co.*, 68 Minn., 308.
*Oswald v. Minneapolis Times Co.*, 65 Minn., 249.

## XIV.

The acts of the bank set out as a basis of liability were *ultra vires* and void. The power of National Banks to deal in stocks is not conferred and therefore prohibited.

*First National Bank v. Hawkins*, 174 U. S., 364; 43 L. ed., 1007.
*California National Bank v. Kennedy*, 167 U. S., 362; 42 L. ed., 198.

Even though the bank might take stock to secure a debt, it could not lawfully enter into a scheme to create a corporation in the hope that the corporation would earn money enough to pay the debt to the bank.

United States Courts will permit a National Bank to plead *ultra vires*.

*First National Bank v. Hawkins*, 174 U. S., 364; 43 L. ed., 1007.
*California National Bank v. Kennedy*, 167 U. S., 362; 42 L. ed., 198.
*Ward v. Joslin*, 186 U. S., 142; 46 L. ed., 1093.
*Building Association v. Home Savings Bank*, 181 Ill., 35.
*Nassau Bank v. Jones*, 95 N. Y., 115.
*Jemison v. Citizens' Savings Bank*, 122 N. Y., 135.

XV.

The amended declaration does not show that all the necessary steps have been taken in the parent proceedings in Minnesota.

Craun v. Hillis, 187 U.S. 271; 47 L. ed., 173.

XVI.

The amended declaration avers that May 6, 1901, when the original judgment was rendered against the Thresher Company and at all times thereafter, said Company was wholly insolvent, and without any assets or property whatsoever. (Rec., p. 7.)

The Minnesota laws never contemplated the appointment of a receiver of the corporation when it had no property or assets to be conserved.

Statutes of Minn., 1878, Chap. 76, Sec. 5907.
Statutes of Minn., 1899, Chap. 272.

## ARGUMENT.

The first point to which plaintiff in error would call the attention of the Court is that

### I.

### THE AMENDED DECLARATION DOES NOT STATE A CAUSE OF ACTION.

The basis of this suit is an adjudication of the District Court of Washington county, Minnesota. While the receiver must assume to recover for the purpose of paying the debts of the corporation, he does not allege that any such debts exist, except the indebtedness of $2,936.07 to the Merchants' National Bank. The allegation of the amended declaration is that certain creditors exhibited their claims and proved the same and that said claims were allowed to the amount of $443,752.17, which last named sum now remains unpaid. (Rec., p. 9.)

The position of the receiver is that the allowance of this sum is binding and conclusive upon plaintiff in error, and that the assessment by the District Court is *res adjudicata.*

The original parties to the proceeding in the District Court were the Merchants' National Bank and the Minnesota Thresher Manufacturing Company. The declaration shows that the Company voluntarily appeared the next day after the suit was instituted and confessed judgment and permitted the receiver to be appointed. The Court then entered an order requiring the creditors to become parties to the action and to exhibit their claims, and thereupon claims were allowed. April 16, 1902, the receiver presented his petition to the Court pursuant to Chapter 272 of the General

Laws of Minnesota of 1899, and notice of the hearing was given by publication or mailing.

The declaration alleges that notice was mailed to plaintiff in error, but does not state that said notice was addressed properly, or stamped, or that it was ever received. It also avers that certain non-resident stockholders, naming them (Rec., p. 14), appeared and contested the petition. Plaintiff in error, however, received no notice and did not appear. Upon the hearing the Court ordered that an assessment of $18 per share of the capital stock of the corporation be levied against the stockholders and ordered the receiver to proceed to collect the same if not paid on notice.

The contention is that this proceeding constituted due process of law, and was sufficient to bind plaintiff in error in the proceeding at law in the United States Circuit Court for the Northern District of Illinois.

*(A) The liability of plaintiff in error was not determined by the proceedings in Minnesota.*

The amended declaration does not allege that plaintiff in error appeared in the proceedings in Minnesota, either in person or by attorney, or that it received notice, or that it had any property within the state. The allegations do not show due process of law.

In Cooley's Treatise on Constitutional Limitations we read at the beginning of page 405. "Where a party has property in a state and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but, beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

This doctrine seems to be universally recognized, but exceptions have been made where stockholders have been represented in the suit by the corporation, and some confusion has arisen therefrom. In all these cases the corporation has represented the interests of the stockholder, or the stockholder has not been considered bound in his individual capacity. Of course in all cases where the stockholder has waived his right to personal service, and agreed that service on the corporation should be sufficient to bind him, he is bound.

Where the statutes of a state provide that service of process on the corporation shall bind shareholders as to certain rights or liabilities of the shareholders, and the shareholder purchased his stock after such laws are passed, he accepted the conditions so imposed by the statutes, and waived his right to personal service. But where no such statute exists, and the shareholder has not waived his rights to personal service, he is not bound by service on the corporation, except in so far as the interests and affairs of the corporation are concerned. He is not bound in so far as his individual interests or liability is concerned.

An illustration of representation by the corporation would be where it was sued for a liability contracted in the ordinary course of business and judgment obtained against the corporation. The shareholder could not thereafter contest the liability of the corporation to the judgment creditor.

Another illustration is that of the Glenn cases, which were suits for unpaid subscriptions to the capital stock. The unpaid subscriptions were a part of the assets of the corporation. A call could be made for them by the directors. The management of the corporation having passed

into the hands of a court of equity, and the corporation being present in court, it is held that the Court may make the call for the unpaid subscriptions, and that such call is binding upon the stockholders, even though they have not been brought in by personal service.

In these cases the corporation was the authorized agent of the shareholder in regard to the matter in hand. In the case at bar the only parties to the suit were the Merchants' National Bank, the corporation, the receiver, and the intervening creditors. The corporation did not represent plaintiff in error, nor the interests of plaintiff in error, in so far as the liability in question was concerned. Its interests and acts were all adverse. It confessed judgment and agreed to the appointment of a receiver without the knowledge of plaintiff in error. It never in any manner represented its individual rights.

Neither was plaintiff in error represented by the receiver. He also was an adverse party. He filed his petition against it to enforce its added liability. Plaintiff in error was not represented in court by any party authorized in any way to represent it. It therefore was not bound in respect to its individual interests or liabilities, nor the extent of the statutory additional liability, if any.

*Hale v. Allinson*, 188 U. S., 56, was a suit like this by a receiver appointed in Minnesota for a corporation of that state, brought in Pennsylvania to enforce the statutory additional liability of stockholders under a decree of the Minnesota Court. The difference between that proceeding and this was that the receiver in that case was appointed before the Minnesota Act of 1899, which will be considered later. The Court said on page 80:

"There remains the further question of maintaining the suit on the ground that it is ancillary or auxiliary to the decree of the Minnesota Court and aids in its enforcement. We think this contention cannot be sustained.

"In the first place all the non-resident stockholders were but nominal parties in the Minnesota suit. Their names were merely placed in its title. No service of process was ever made on one of them, and as the suit was not one in which service of publication of process could be ordered, there was nothing in the nature of the suit to give them notice or to enable the Court to give judgment against them without their appearing. The Court did not assume to give any such judgment. Indeed the complaint averred that there was no means of obtaining jurisdiction over the non-resident stockholders, and the Court assumed that it had no jurisdiction over them, and on account of such lack of jurisdiction it only gave judgment against those resident stockholders who were parties to the suit."

In *Schrader v. Bank*, 133 U. S., 67, 33 L. ed., 564, the Court said that the individual liability of stockholders must be restricted to such contracts, debts and engagements as have been duly contracted in the ordinary course of business. That after the bank went into liquidation a judgment against it was not binding upon the stockholders so as to fix their individual liability. This was an appeal from the Circuit Court of the United States for the Northern District of Illinois.

In *Finney v. Guy*, 189 U. S., 335, 47 L. ed., 839, in a suit the same as in *Hale v. Allinson*, the Court said, on page 340: "Whether a cause of action is stated in a pleading is generally to be decided with reference to the law of the state where the action is pending." The pleadings are not sufficient to

state a cause of action in Illinois. In Illinois plaintiff in error was not concluded by the order of the Minnesota Court.

In *Chestnut v. Pennell,* 92 Ill., 55, the amended declaration charged that the Lamar Insurance Company was a corporation of Illinois, created to insure against loss by fire; that plaintiff took out a policy upon property which was afterwards destroyed by fire; that plaintiff afterwards obtained a decree against the corporation for the loss, which remains unpaid; that the Company was insolvent; that the defendant was a stockholder; that according to the statutes of Illinois defendant was individually liable to plaintiff for the said debt of the corporation.

Upon the trial of the case plaintiff gave in evidence the proceedings in equity to discover assets, the appointment of the receiver, the order to prove claims, the allowance of the claim of plaintiff, and the decree authorizing the receiver to collect from all stockholders. Defendant objected to the admission of the evidence, but his objection was overruled, and judgment was entered.

The case was reversed by the Supreme Court, which said: "Plaintiff's right to recover is based solely upon a loss by fire against which he was protected by a policy of insurance issued by the Lamar Insurance Company. There is in this record no proof of the execution of such a policy, and no proof of any loss by fire. It is, it is true, recited in the decree of the Superior Court of Cook county in the case of *Edwin Burnham et al v. The Lamar Insurance Company* (a copy of which was read in evidence over the defendant's objection), that the Lamar Insurance Company issued to the present plaintiff on the first day of April, A. D. 1871, its policy of insurance in the sum of $2,500, good for one year, on a cer-

tain building, etc., and that said building was destroyed by fire on the 14th day of February, 1872; but the present defendant was no party to the decree in that case, either actually or constructively, and so cannot be bound by it. * * * The Court erred in admitting the copy of the decree of the Superior Court of Cook county in evidence and also in rendering judgment for the plaintiff."

*Great Western Telegraph Co. v. Barker*, 56 Ill. App., 402, was decided in 1894, on demurrer to the declaration. From the declaration it appeared that a suit in equity was begun to wind up the affairs of the Telegraph Company; a receiver was appointed, creditors proved up their claims and a decree was entered assessing 35 per cent. on all subscribers who had not paid in full, although the Court found that some of the subscribers had paid more than others upon their stock. The defendant, Barker, although a stockholder, was not a party to that proceeding. The Appellate Court held that the contract only bound Barker to contribute ratably to the payment of the debts of the corporation; that the assessment was made in violation of defendant's contract, and such as, if made by the directors, would have created no liability on his part to pay it. The Court said:

"It is claimed, however, that he can make no defense under his contract because he was represented in fixing his liability by the corporation which was the other party to his obligation, and which therefore represented both sides of the contract in the suit in equity, and that while Terwilliger and other of his fellow stockholders were obtaining an assessment, the plaintiff was his representative in making defenses against it."

After reviewing the cases in Illinois and other states the

Court says on page 418: That the contention that the assessment by the Court is of the nature of a judicial decision binding upon Barker is founded alone on the presence of the corporation in the suit; that if the contention is correct it must be because the corporation has power to waive defendant's right as an individual; that the corporation has no such right outside of court and that the board of directors can not waive his right to a lawful assessment.

The Court said on page 419:

"In the case before us there is an order reciting on the face of it facts which show that it is illegal and an arbitrary violation of individual right. It would be no less so if it had ordered those who, by its findings, had paid in full, to pay again, or that the burden of the assessment should be borne by those over a certain age, or living in a certain county or state. If such an order is binding and conclusive against the individual stockholders, scattered as alleged over more than twelve states and territories, in a suit begun and carried on by a few of their fellow stockholders, by virtue of a fiction of law that they have had their day in court and an opportunity to show why the assessment should not be made because the corporation was there, then the courts may be easily made the instruments of fraud and injustice. The assessment in question was held void in *Great Western Telegraph Co. v. Burnham*, 79 Wis., 47.

"But we understand that the corporation is not authorized to act for or represent the defendant as to his individual liability to it, and that the order was not intended and is not to be treated as a judgment against him, but rather as the exercise by a court of a corporate function."

The Court says that it is conceded that Barker might de-

fend on the ground that he never signed the contract, or that it was obtained by fraud or made in violation of law, or that the relation of stockholders was cancelled before the assessment; and that it sees no reason why he cannot insist upon the conditions of his contract; that the right claimed by him is personal, and if the adjudication is to be treated as an adjudication of his individual right, he would have been a necessary party to the suit where it was made.

This case was affirmed in a very short *per curiam* opinion, 166 Ill., 150.

In *Ward v. Farwell*, 97 Ill., 593, the Court said on page 616: "The general law unquestionably is that where some right is sought to be enforced against a corporation and the relief asked will only affect the stockholders as stockholders and no discovery or relief is sought against them as individuals, then they are unnecessary parties to a bill in chancery."

The Supreme Court of Minnesota itself has frequently announced that under the circumstances of this case a stockholder would not be bound because the corporation was a party.

In *Danforth v. Chemical Company*, 68 Minn., 308-311, the Court said: "If a party has a cause of action against the company when its property passes into the hands of a receiver, no good reason can be given for holding that he may proceed by the ordinary action at law against the insolvent corporation alone, obtain a judgment on default, and then, in response to a notice to creditors, file a complaint in intervention in which his only cause of action as alleged is based upon the judgment. And many excellent reasons exist why no such doctrine should be enunciated."

The Court adds that it would open the door to fraud and collusion, and also that parties who have a right to be interested would not have the right to investigate and contest the judgment if such doctrine should prevail.

In *Commercial Bank v. Azotine Mfg. Co.*, 66 Minn., 413, it was complained that the Court did not find who were the stockholders and the legal extent of the liability of each. But the Supreme Court said that the District Court *did* find all who were stockholders in Minnesota, and the amount of stock held by each; that certain stockholders were non-residents and beyond the jurisdiction of the Court. The Supreme Court then said: "Findings as to the amount of shares of stock held by non-resident stockholders over whom the Court had acquired no jurisdiction or any determination as to their liability would have been uneless for no one would have been bound by such findings." (Page 416.)

The subject was again considered by the same Court as late as 1904, in *Willius v. Mann*, 91 Minn., 494. This was a case where a bank reorganized and afterwards failed again, and it was sought to hold certain old stockholders bound by the decree effectuating the plan of reorganization. The Court said:

"The stockholders of the old bank who did not become members of the new, such as appellants in this case, were not parties to the reorganization proceedings. They were not served with notice of the pendency of the proceeding, except by publication, which was insufficient to warrant a personal judgment against them, and were clearly not bound by the judgment against the corporation in so far at least as concerned their personal liability.

"It is true that in proceedings against the corporation, the

corporation when duly summoned and brought into court represents the stockholders; and all stockholders in so far as the interests and affairs of the corporation are concerned, are bound by the judgment of the Court. But the stockholders are not bound by any such judgment as respects their individual interests or liability."

A review of many other cases along this line will be found in the carefully prepared brief of Mr. Tanzer filed herein, as *amicus curiae*, on constitutional questions, at pp. 42 to 57.

Probably the latest expression of an appellate court on this subject is to be found in *Converse v. Stewart*, 105 App. Div. (N. Y.), 478. This case was decided June 23, 1905, all the justices concurring. It was a suit brought by Converse, receiver of the Minnesota Thresher Manufacturing Company, the defendant in error in this case, against one Stewart in the state of New York upon the same assessment sued upon in the case at bar. The case was tried before a referee who found for the receiver, but the judgment was reversed upon appeal.

The New York Court refers to the constitution and statutes of Minnesota and says:

"It will be noticed that this provision of the constitution does not expressly impose upon stockholders of a corporation a liability for the debts of the corporation nor does it state for whose benefit the liability is imposed. A stockholder in a corporation shall be liable for the amount of stock held or owned by him, and it was this liability that the defendant assumed when he became a holder or owner of stock of this corporation. The extent of liability being indefinite, the object for which it was imposed not being stated, and the person to whom or for whose benefit it was imposed not be-

and where the court had no jurisdiction over him, cannot be the basis of such a recovery. It follows that the judgment appealed from must be reversed."

In the case at bar we therefore conclude that plaintiff in error was not concluded by the order and assessment of the District Court of Minnesota, and therefore such order cannot be the basis of a recovery against it in Illinois; that as the declaration in the case at bar makes it the basis of recovery, it does not state a cause of action, and the demurrer should have been sustained.

*(B) The amended declaration does not show that the stockholders of the Minnesota Thresher Manufacturing Company are subject to additional liability.*

When Minnesota was admitted as a state its constitution provided: "Each stockholder in any corporation shall be liable to the amount of stock held or owned by him."

In 1872 the constitution was amended to read as follows: "Each stockholder in any corporation (excepting those organized for the purpose of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him." The people of the state recognized the desirability of excepting stockholders in manufacturing corporations.

The amended declaration shows that in 1884 the Northwestern Manufacturing & Car Company failed, and the Minnesota Thresher Manufacturing Company was organized by its creditors for the purpose of continuing the business, exchanging their claims for stock of the new company, which was organized under an act providing for the organization of corporations for manufacturing or mechanical pur-

poses. The articles of association stated the purposes, as follows:

"The objects for which this corporation is formed are the purchase of the capital stock, evidences of indebtedness issued by it, and the assets of the Northwestern Manufacturing & Car Company, a corporation existing under the laws of the state of Minnesota, or any portion of said capital stock, evidences of indebtedness, or assets, and the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and manufacture and sale of all articles, implements and machinery of which wood or iron, or either of them, form the principal component parts, and the manufacture of the materials therein used."

It is evident that the purpose was to carry on a manufacturing business. The purchase of the manufacturing plant, effects and good will of the Northwestern Mfg. Co. was a mere incident, and a part of the purpose of carrying on a manufacturing business. The company would have had the same right had its articles of association stated the purposes as follows: "The objects for which this corporation is formed, are the manufacture and sale of steam engines of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood or iron, or either of them, form the principal component parts, and the manufacture of the materials therein used."

The constitution provided that stockholders in corporations organized for the purpose of carrying on any kind of manufacturing or mechanical business, should not be liable on their stock.

At the time the shareholders acquired their stock in the

Thresher Company, it appeared beyond question, and they were notified in the printed scheme, that no personal liability could attach to the stockholders.

Long afterwards, the courts of Minnesota, in proceedings to which plaintiff in error was not a party, under a most peculiar construction of the constitution and the charter, held that the Thresher Company was not "organized for the purpose of carrying on any kind of manufacturing or mechanical business," and that each stockholder, including plaintiff in error, was liable for the debts of the Company.

In *Brunswick Terminal Co. v. National Bank*, 192 U. S., 396, 48 L. ed., 491, the Court said on page 390: "This additional liability of a stockholder depends on the terms of the statute creating it, and, as it is in derogation of the common law, the statute cannot be extended beyond the words used."

In that case it was claimed that the stockholder was bound by the highest judicial tribunal of the state in the construction of the liability. But this Court held that the questions had not been so definitely determined, as, under the circumstances, to conclude this Court, which took into consideration the fact that the decisions were rendered after the transactions in question, and in proceedings to which the stockholder was not a party. The Court said on page 396: "When it took the collateral shares in its own name, it seems to us that it had the right to assume that it ran no risk of incurring liability by virtue of the terms of the charter of the Brunswick Bank for indebtedness created after, in the ordinary course of business, it ceased to hold the stock, and that it could not reasonably have supposed that Sec. 1496 of the code of Georgia was intended arbitrarily to make all who might have held the stock in the Brunswick Bank from time

to time liable for transactions during twenty years (the period of limitations), after they had ceased to be stockholders.

"There had been no such ruling in respect to the statutory liability imposed by the charter of the Brunswick Bank on its stockholders when the loan was made and paid, and the cases cited from Georgia reports prior to 1894, all of which we have carefully examined, dealt with different provisions, and involved different considerations."

When plaintiff in error took the stock in question, about January 1, 1885, it had the assurance in plain language of the constitution and charter, that shareholders of this company were subject to no additional liability.

The highest tribunal in Minnesota has clearly held that the intention of the corporators must be considered in sustaining the language of the articles of association, and that when it appears from the articles that the real and only purpose of the organization is manufacturing, and such other business as may be incidental thereto, then the stockholders are exempt from the constitutional and statutory additional liability. See cases cited under head III.

Plaintiff in error therefore contends that this Court is not bound by subsequent decisions to which it was not a party, changing the plain purport and intention of the state constitution and of the charter of this Company. If plaintiff in error is not bound by such subsequent construction, and this Court construes this manufacturing company to have been organized for the purpose of manufacturing, then no additional liability attaches, and the demurrer to the declaration should have been sustained.

*(C) The Minnesota laws did not contemplate that a receiver should be appointed for a corporation which has no property or assets to be conserved.*

The allegation of the amended declaration is "that at the time said judgment was entered (May 6, 1901), and said executions were issued and returned as aforesaid, and for a long time prior thereto, and at all times thereafter, said Thresher Company was and now is wholly insolvent, and without any assets or property whatsoever."

The fact is that said company had been insolvent for a long time prior thereto as alleged, and had been in the hands of a receiver appointed by the U. S. Circuit Court at St. Paul, Minnesota, which receiver had disposed of all its assets and property.

On pages 2 and 3 of Mr. Tanzer's brief will be found the sections of Chapter 76 of the Minnesota Act of 1878, reenacted in 1894. They provide for the winding up of the affairs of insolvent corporations, and for the appointment of receivers.

Section 5907 provides: "If on the coming in of the answer, or upon the taking of any accounting, it appears that such corporation is insolvent, and that it has no property or effects to satisfy such creditors, the court may proceed without appointing any receiver, to ascertain the respective liabilities of said directors and stockholders, and enforce the same by its judgment as in other cases."

The Act of 1899 is set forth on pages 3 to 9 of Mr. Tanzer's brief. Sec. 3 provides, that the court shall determine the probable amount of assets available for the payment of the debts and expenses, and if it appears that the ordinary assets will probably be insufficient to pay and discharge in full

and without delay its indebtedness and the expenses of receivership, and that it is necessary to resort to the liability of stockholders, the court shall levy an assessment.

Aside from Chapter 76, the Minnesota court had no authority to appoint a receiver except as a court of equity, and as a court of equity it could not appoint a receiver of a corporation which had "no property or assets whatsoever." No express authority is given by the statutes so to do. They are in derogation of the common law and their meaning will not be extended beyond the express authority conferred. Not only is no express authority conferred, but the statutes themselves evidently contemplate a receiver only when there was property to be administered by the court.

The Act of 1899 did not extend the powers of the court in the appointment of receivers, and in fact did not of itself authorize the appointment of a receiver in any case. It merely provided upon that subject "or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any district court of this state, whether under or pursuant to any of the provisions of Chapter 76 of the General Statutes of 1894 of Minnesota and the acts amendatory thereof, or under or pursuant to any other statute of this state, or under the general equity powers and practices of such court; the district court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this Act provided." (Sec. 1.)

It is plain that the Legislature by the Act of 1899 did not intend to provide for the appointment of a receiver, but merely provided for procedure when a receiver was appointed under Chapter 76, or under general equity powers. In

neither case could the court appoint a receiver of a corporation which had no property or assets whatsoever.

Plaintiff in error therefore contends that the district court of Minnesota was not authorized to appoint defendant in error as a receiver, and therefore he cannot, in any event, maintain a suit as such receiver, and that the demurrer should be sustained to his declaration for that reason.

*(D) The amended declaration fails to show that the claims allowed by the District Court of Minnesota were not in whole or in part claims arising out of torts of the corporation.*

Cook on Corporations, 5th ed., Sec. 217, reads:

"Statutory liability imposed upon the stockholders in corporations is a liability exclusively for debts and demands accruing against the corporation by reason of its contracts. It cannot therefore be enforced to pay damages recovered against the corporation in an action in tort."

This is a well established doctrine and it does not alter the case that the liability of the corporation for a tort may have been reduced to judgment by a recovery for the damages suffered.

Plaintiff in error therefore contends that the amended declaration was demurrable on the ground that it did not allege that the claims allowed by the district court of Minnesota were all contractual. The pleader must make a case against the defendant after all intendments are taken most strongly against him.

*(E) The receiver had no legal capacity to maintain the present action until authorized so to do in an equitable proceeding in which all parties interested were joined.*

The receiver failed to maintain his suit on this ground in *Evans v. Nellis*, 187 U. S., 271, 47 L. ed., 173. In that case the Court held that the Kansas statute as construed by the Supreme Court of that state required the receiver to bring all the stockholders into court to the end that the debts of the corporation and liabilities of the stockholders might be determined.

In the case at bar, the Minnesota Act of 1899 is silent as to whom should be made parties to the petition of the receiver that the debts of the corporation be ascertained and the liabilities of the stockholders determined. The law on that subject is precisely as it was before the act was passed. The prior act was also silent on that subject, and yet the Supreme Court of Minnesota held in *Allen v. Walsh*, 25 Minn., 543, and in subsequent cases following that decision, that it was obvious that the remedy contemplated a single action in equity in which all persons having any interest should be joined. It therefore follows that at the time this receiver filed his petition to determine the liability of the stockholders, the law of Minnesota was, and always had been, that such liability must be established in an equitable action in which all parties having any interest should be joined.

It is true that Sec. 5 of the act of 1899 provided that the assessment should be conclusive against all parties liable, whether appearing or represented at said hearing, or having notice thereof, or not. It must be presumed, however, that the Legislature did not intend to pass upon the individual liability of its own citizens, over whom it had jurisdiction,

without notice, and that this section was only intended to apply to non-residents over whom the Court had no jurisdiction. It is a general rule of law that all parties interested should be joined in an action affecting their individual interests, but that parties beyond the jurisdiction of the Court are excepted.

It appears from the amended declaration that the only parties to such proceeding were the receiver, the Merchants' National Bank, and the corporation. It is true creditors were permitted to intervene, and it is alleged that a few stockholders (naming them) voluntarily appeared, but there is no claim that all the stockholders, or even all the stockholders in Minnesota over whom the Court had jurisdiction, were joined in the action.

We therefore contend that the demurrer should have been sustained because the stockholders resident in Minnesota were not joined in the proceeding.

*(F) The amended declaration alleges acts of the bank as a basis of the liability, which are ultra vires and void, and upon which a liability cannot be predicated.*

The allegations (pages 9 and 10) are that May 10, 1884, defendant, together with other creditors and certain stockholders, organized a new corporation, the same being the Thresher Company; that said Thresher Company exchanged its preferred stock at par for the claims of the creditors of the Car Company, and that defendant exchanged its claims against the Car Company for the said 274 shares of preferred stock of said Thresher Company.

It therefore appears from the amended declaration that plaintiff in error, together with other creditors, organized

the Thresher Company for the purpose of exchanging their claims against the Car Company for the stock of the Thresher Company. Plaintiff in error as a National Bank had no right to purchase the stock of the Thresher Company, much less to engage in a speculation consisting of the organization of a corporation, of which it should be a part, for the purpose of making money. It can make no difference in this case that the money it sought to make was money it had already lost in another enterprise. It might just as well endeavor to make good its losses in any other enterprise as in that of the Car Company. While it is true that a national bank is permitted to acquire stock as collateral to a debt, it is against public policy to permit it to go so far as to permit it to organize other corporations to make good its losses.

In *Building Association v. Home Savings Bank*, 181 Ill., 35, the association was not permitted by law to acquire real estate except such as had been mortgaged to it or in which it had an interest. The association took a mortgage on lot 6, which was already mortgaged, together with lot 5. The association, desiring to realize on its loan, found it could not acquire lot 6 without acquiring lot 5, and it therefore traded certain lots for lots 5 and 6 and assumed the mortgage already on said lots. In a suit brought to foreclose the first mortgage on said lots 5 and 6, it was held that the association had no power to acquire lot 5, and had no power to assume the mortgage thereon, and therefore no deficiency decree could be rendered against it for assuming such mortgage.

But it is said the defense of *ultra vires* is looked upon with disfavor, and that a national bank which has received stocks and dividends thereon is estopped from denying its

liability. There is no allegation that plaintiff in error ever received any dividends. The contrary is the fact. No dividends were paid. The Thresher Company was never anything but a failure and plaintiff in error had abandoned the stock and dropped it from its assets many years ago.

In *California National Bank v. Kennedy,* 167 U. S., 362, 42 L. ed., 198, this Court held that a national bank is not estopped from asserting that the transaction by which it acquired the stock was *ultra vires,* and that it would not be estopped by reason of having received dividends; that an *ultra vires* transaction which is void cannot be ratified.

In *Ward v. Joslin,* 186 U. S., 142, 46 L. ed., 1093, the Court said on page 151 that one of the grounds upon which the doctrine of *ultra vires* rests is that the interest of the stockholders should not be subjected to such risks; that the rights of the stockholders of this Loan and Trust Company should be considered as well as those of creditors, and that they should not be held directly liable, unless such liability was within their contract in legal contemplation; that the rule of this Court is that a contract made by a corporation beyond the scope of its powers, express or implied, cannot be enforced by the application of the principle of estoppel.

The argument is stronger in the case of a national bank. In such case not only the interests of the stockholders should not be subject to such risks, but the general public who are depositors in national banks should not be subjected to such risks. Public policy demands that a national bank be not estopped to plead *ultra vires* in an action to hold it liable for the organization of another corporation. And this is a good ground of demurrer to the amended declaration.

## II.

THE MINNESOTA ACT OF 1899, CHAPTER 272, IS UNCONSTITUTIONAL, AT LEAST IN SO FAR AS IT EXTENDS TO THE LIABILITY OF PLAINTIFF IN ERROR.

The constitution provided that the stockholders of certain corporations should be individually liable, without defining that liability or providing for its enforcement. It was left to the Legislature to define the liability and prescribe the remedy, and in that respect the Legislature was without restriction except such restriction as was imposed by the constitution. Prior to the organization of the Thresher Company the Legislature *had* defined the liability and provided the remedy.

Sec. 111 of the General Laws of Minnesota, 1878, provided that each stockholder "shall be liable to the amount of stock held or owned by him for corporate debts hereafter contracted." The law in Minnesota as it stood in 1884 had been construed by the highest tribunal in the state in *Allen v. Walsh*, 25 Minn., 543, by an opinion rendered in 1879.

This was an action brought by a creditor against a single stockholder to enforce his statutory liability. A demurrer to the complaint was sustained in both the District and Supreme Courts. The Supreme Court said that the constitution contained neither grant of power to, nor restraint upon, the legislative authority to deal with this subject, except that the provision of the constitution could not be changed. The Court then proceeds to construe Chap. 76 of the General Statutes as follows:

"Authority is given in such action whenever necessary to take an account of the property and debts due to and from the corporation, and to appoint one or more receivers to col-

lect and convert into money the corporate demands and property, and make just and fair distribution of the proceeds among its creditors, and in case its assets prove insufficient to satisfy its debts, the respective liabilities of the stockholders are to be ascertained, and the amount payable from each is to be adjudicated, and its payment enforced as in other cases." (555.)

The Court further said on p. 556:

"It is reasonable to suppose that the Legislature intended by these sections to provide an efficient and sole remedy for enforcing payment of the debts of an insolvent corporation out of the individual liability of its stockholders, for the rule is well settled that, when a statute which creates a right also prescribes an adequate remedy, the latter is to be taken as the exclusive one. (*City of Faribault v. Misener*, 20 Minn., 396; Sedgwick Const. Law (2d ed.), 344.) The chapter which gives this remedy forms a part of the general statutes which were adopted in 1866, and which contained the enactment that creates the statutory liability, and therefore the rule referred to is fairly applicable."

The Court concluded that obviously the remedy provided contemplated a single equitable action in which all persons having any interest should be joined.

This was the construction of the law at the time plaintiff in error became a stockholder. It was that the constitutional liability was correctly defined by the Legislature when it confined it to the debts of the Company. The Court said that the statutes provided the remedy for enforcing his payment of the debts of the corporation, and that such remedy was exclusive because the rule was well settled, that when a statute which creates a right also prescribes a remedy, the latter

is exclusive, and that the general statutes *create* the statutory liability. It would perhaps have been a little more exact to have said that the general statutes define and make certain the liability created by the constitution, for that is evidently what the Court meant.

In defining the accounting the Court says authority is given to take an account of the property and debts due to and from the corporation and to make distribution among the creditors, and in case the assets prove insufficient to satisfy the debts, to determine the respective liabilities of the stockholders.

It is plain that the Court only considered that the liability extended to the debts of the corporation. When plaintiff in error became a shareholder he was therefore advised by the constitution and by the charter that he was exempt from individual liability, because the corporation in question was organized for the purpose of carrying on a manufacturing business. He was further advised by the statute and by the highest tribunal in the state of Minnesota that the law of that state did not hold any stockholder personlly liable except for the debts of the corporation, and that such liability could only be enforced by a single action in equity by a creditor in which all parties having an interest should be joined. These were the rights guaranteed to him by the constitution of the United States and relying upon them he became a stockholder. It is immaterial whether these rights were a sufficient protection to the creditors of corporations or not. ~~His~~ Their rights could not be thereafter increased. Whether creditors were sufficiently protected was a mere matter of policy. A creditor knew his rights, and could extend credit to the cor-

poration as he saw fit. If he did not think himself sufficiently protected he could withhold credit.

After the rights of the creditors and stockholders are fixed by the constitution, by the statute, by the interpretation of the law by the Supreme Court, by the acquiring of stock, and by the giving of credit to the corporation, there is no good reason why these rights should be changed by subsequent legislation. The creditor could not have relied upon it in extending credit; he has no right to ask it; he has no right to complain if it is not given. Any act which gives a creditor additional rights, or which adds to the liability of the stockholder, or which takes away from the creditor rights that he had, is unconstitutional.

The Act of 1899 did not merely change the remedy or mode of procedure. It changed the rights of creditors. It changed the rights of stockholders, and it vastly added to their pecuniary liability. As was said in *Edwards v. Kearzey*, 96 U. S., 595, 24 L. ed., 793, the remedy subsisting when a contract is made is a part of its obligation and any subsequent law of the state which so affects it as subsequently to impair and lessen the value of the contract is forbidden by the constitution, and is void. This doctrine is fully maintained in Illinois, and to such an extent that it was held that where a foreign corporation had loaned money in Illinois and taken a mortgage as security therefor, prior to the taking effect of the act of May 26, 1897, which required foreign corporations to file a copy of their charter with the Secretary of the State, and that failing to comply with the act should not maintain any suit or action in the courts of the state, was such a change in the remedy as could not be sustained, and that a foreign corporation under such circumstances might

maintain a bill to foreclose its mortgage without showing compliance with the act of 1897. (*Richardson v. U. S. Mortgage Co.*, 194 Ill., 259.)

Under the law of Maryland of 1892 the individual creditor had a right to proceed against the individual stockholder of the debtor corporation. In 1904 an act was passed taking away this remedy and substituting a remedy in equity by all the creditors against all the stockholders. The Court of Appeals of Maryland upheld the constitutionality of the statute. The United States Court of Appeals, however, held that the Maryland Court was wrong. The Court said:

"We have no difficulty, therefore, in deciding that this act of the Legislature of Maryland of April 12, 1904, entirely retrospective in its operation as it is, is void as being within the inhibition of Article I., Clause 10 of the Constitution, declaring that no state shall pass a law impairing the obligation of contracts."

The Court held that it amounted to more than a mere change in the remedy, consisting of a difference between two substantive rights; that it was a change in the essential nature of the right itself, and a clear impairment of the obligation of the contract out of which such right arose; that the law of 1904 was an impairment of the contract existing between the creditor and the stockholder at the date of its passage. (*Knickerbocker v. Meyers*, 139 Fed. Rep., 111.)

In that case (decided in June, 1905) an individual creditor was seeking to collect from an individual stockholder and it was held that the act of 1904 changing the remedy was unconstitutional. Upon the same reasoning, if the liability of the stockholder is changed from an equitable action to one at law, by a different party, by a law retrospective in its oper-

ation, such law is void with respects to rights vested at the time of its passage. We have already cited a number of other cases to this effect in our brief.

The question then arises, was the change in the remedy provided by the act of 1899 so great as to impair the value of the stockholders' contract, and subject him to increased liabilities? It would seem that a mere cursory review of the changes made to the disadvantage of the non-resident stockholder would be sufficient to show the act unconstitutional as to plaintiff in error. The points and the authorities are particularly enumerated in the brief herein, being numbered from 1 to 10 under head XI.

(1) It adds to the liability of stockholders the costs and expenses of a receivership.

It is a well known fact that the costs and expenses of a receivership are often equal to the entire debts of a company. In this case we are informed in *Converse v. Stewart*, 105 App. Div., 475 (94 N. Y. Supplement, 310), that the amount added for these expenses was $127,315.83.

*Richmond v. Irons*, 121 U. S., 27, 30 L. ed., 864, was a case from the Circuit Court of the United States for the Northern District of Illinois. The bill was filed to wind up the affairs of a national bank and to enforce the statutory liability of its stockholders. The Circuit Court allowed 20 per cent. of the amount of the debts of the bank in addition thereto to cover the expenses of the receivership. This Court said:

"This sum we think ought not to have been allowed. The ordinary costs of the cause are of course taxable as against the defendants as in other cases, but we see no reason why the stockholders should be required to contribute as a debt

due from the bank or themselves to a fund for the payment of the expenses of the receivership."

The expenses of a receiver are something over which the unfortunate shareholder has no control. The shareholder in question may be willing to pay his assessment, but he must also pay the expenses of searching out and prosecuting stockholders who refuse to pay, whether rightfully or wrongfully, and perhaps at the end of an expensive litigation it is discovered that the receiver has been prosecuting a shareholder who was insolvent.

*Evans v. Nellis*, 101 Fed. Rep., 920, was very similar to the case at bar. It arose under the Kansas statutes. The action accrued prior to 1899. In 1899 the Legislature of Kansas passed an act similar to the Minnesota act of 1899 in that it vested in a receiver the power to enforce the statutory liability which had theretofore existed in favor of creditors. The Court ordered the receiver to proceed against all the stockholders, and the receiver brought the suit in question in the U. S. Circuit Court for the Northern District of New York.

That Court held that the new law wrought a sweeping and radical change, creating new liabilities and providing new remedies. It pointed out that the money collected by the receiver would be used to pay the costs and expenses of receivership and all claims against the corporation, whereas this constitutional liability only applied to debts of the corporation arising out of contracts in the usual course of business; that it also deprived the stockholder of defenses of counter claim, set-offs, etc., of which he might avail himself against the pursuing creditor; that the liability to the receiver might be twice the amount necessary to pay the corporate debts.

In that case the debts for which the stockholders were liable amounted to $16,000, and the assessment levied would have amounted to $60,000. The receiver sought to obviate this point by stipulating that the Court might regulate the amount of recovery so that defendant should only pay his *pro rata* share of $16,000. The Court refused to do this, holding that the law was unconstitutional as applied to that case, and that the receiver had no cause of action against the stockholders.

In affirming this case the Supreme Court of the United States held that it was unnecessary to decide the constitutional questions raised, as it did not appear that the receiver had complied in the parent proceeding in Kansas with all the provisions of the Kansas Act. It did not appear that the receiver had brought into the suit in Kansas all the stockholders that were within the jurisdiction of the Court.

(2) It permits the Court upon mere affidavits to assume the probable indebtedness of the corporation and collect it of the stockholders, although the creditors may not file their claims in time to permit them to participate in the distribution. In this estimate the Court has to take into account (without any judicial determination, and without notice to non-resident stockholders) the probable insolvency of other stockholders. The Court does not take into account the assets of the corporation, but "such amount as may be realized therefrom within a reasonable time * * * to pay and discharge in full and without delay its indebtedness and the expenses of such assignment or receivership." That is to say, under this Act the assets of the corporation are to be sacrificed so as to be realized upon without delay.

One cannot read this Act without being impressed with its

utter loseness. The action of the Court may be based on mere rumors. It is a mere matter of impression on probabilities which if presented to one judge might result in an assessment twice as large as if it were presented to another judge of a different temperament, and this guess is made by statute a judicial adjudication conclusive upon a non-resident stockholder without notice.

(3) It adds to the liability of stockholders, liabilities incurred by the corporation after it ceased doing business. Prior to 1899 the laws of Minnesota only contemplated debts of the corporation incurred in the ordinary course of business. The act of 1899 includes debts incurred by the receiver, whether on his own account or on account of the corporation.

(4) It adds to the liability of stockholders liabilities accruing against the corporation outside of the usual course of business, such as liabilities for torts, *ultra vires* acts, etc. As we have already seen, these were not liabilities at the time plaintiff in error became a stockholder.

(5) It permits a conclusive judgment to be entered against a non-resident stockholder without due process of law. This question has already been considered.

(6) It permits an unreasonable and unnecessary large assessment to pay debts and expenses that are only problematic in an *ex parte* proceeding, and makes that assessment a conclusive adjudication on non-resident stockholders.

The amended declaration averred that claims were allowed by the Court to the amount of $443,752.17, and that the number of shares of stock outstanding was 70,561 of the par value of $50 each. It would therefore take $6.29 on each share, or an assessment of 12½ per cent., to pay the claims

estimated by the Court. But the Court levied an assessment of $18 per share, or 36 per cent. The assessment sued for is about three times the amount necessary to pay the debts of the corporation as shown by the declaration. This is so unreasonable that a foreign jurisdiction would not enforce such an assessment without permitting the defendant to be heard in regard to it.

(7) It prescribes one form of remedy for non-resident stockholders, being an equitable proceeding to which they are parties and have their day in court, and another form of remedy for non-resident stockholders, being an action at law with practically all questions conclusively determined against them.

The injustice of this is apparent and is commented upon in *Hale v. Harden*, 95 Fed. Rep., 747, p. 788, par. 6.

(8) It deprives the stockholders of defenses which may have become absolute, such as statute of limitations, release, extension of time by creditors, set-offs, etc.

(9) It changes the liability from one that could only be enforced in Minnesota by creditors, and which could not be enforced against plaintiff in error unless he chose to go into the state of Minnesota, to one that could be enforced by a receiver in Illinois where he was concluded on all the defenses that he might have, except that of payment.

At the time plaintiff in error became a stockholder the law of Minnesota was that a receiver had no such cause of action against stockholders; that the added liability was not an asset of the corporation; that it was a liability merely to the creditors, and that it could only be enforced by the creditors bringing an equitable action in Minnesota where all parties interested should be joined.

After plaintiff in error became a stockholder the Supreme Court of Minnesota decided that the constitutional liability was self-executing. Even if it was, all the authorities practically now agree that it was a liability that was not an asset of the corporation, and could only be enforced by creditors in an equitable proceeding.

Such a change in the remedy as the retrospective act of 1899 is unconstitutional. (*Knickerbocker v. Meyers*, 139 Fed. R., 111.)

In *Hale v. Allinson*, 188 U. S., 56, 47 L. ed., 380, this Court decided that under the laws of Minnesota prior to 1899, a receiver appointed in that state could not enforce the statutory liability of stockholders in a foreign state. The Court held that even in Minnesota and though ordered to do so by the Minnesota Court, he could not proceed against the stockholders.

The same question was again raised in *Great Western M. & M. Co. v. Harris*, 198 U. S., 561, 49 L. ed., 1163, and it was again held that the receiver's right to sue in a foreign jurisdiction is not recognized in the United States Courts upon principles of comity, and that the Court of his appointment could clothe him with no power to exercise his official duties beyond its jurisdiction.

In *Woodworth v. Bowles*, 61 Kan., 569, the corporation in question became insolvent in 1895. In 1897 the Legislature passed an act providing that receivers of insolvent banks might prosecute actions for a recovery on the statutory liability of stockholders and making this liability an asset of the bank. Prior to that time this statutory liability had been held only enforceable by creditors. After the act of 1897 the action in question was commenced by a creditor against the

stockholders and receiver to enforce the statutory liability. The receiver filed an answer and a cross-petition praying that he be allowed to collect the statutory liability. The Court entered an order according to the prayer of the receiver, and the stockholders appealed.

The Supreme Court of Kansas stated that the uniform holding of the courts has been that such an act cannot be given a retroactive effect. The Court said: "It cannot be done because the relation between the creditors of a corporation and its stockholders is a relation of contract; * * a contract which the law implies from the stockholders' willingness to assume the liability imposed by the statute as evidenced by the stock subscription, and the creditor's willing ness to accept the advantage and security allowed to him."

The Court cited authorities to the effect that the statutory liability cannot be repealed as to indebtedness which had accrued, as such repeal would violate the rule of the constitution which forbids the enactment of state laws impairing the obligation of contracts. The Court held that while the creditor might have maintained his suit, the receiver could not, and that the change in the law was not merely a change in the remedy.

As we have already shown the same doctrine was held in *Knickerbocker v. Meyers*, 139 Fed. Rep., 111.

In *Western Nat. Bank v. Reckless*, 96 Fed. Rep., 70, it was held that this statutory liability of stockholders cannot be interfered with by state legislation. The Legislature of New Jersey passed an act in 1897 providing that no action at law should be maintained in New Jersey against any stockholder, to enforce such a liability arising under the laws of another state. This act was held unconstitutional.

In *Grand Rapids Savings Bank v. Warren*, 53 Mich., 557, Justice Cooley held that a statute giving creditors a new remedy against stockholders cannot affect those who take shares in the corporation before its passage, nor can it so far as existing claims are concerned supersede the remedies in force when they arose, and in reliance on which they were contracted. If the creditors cannot be affected by subsequent legislation, it follows that the stockholders cannot, as they are the other parties to the contract.

In the last edition of Cook on Corporations (5th Ed.) the author says in Sec. 218:

"The statutory liability of the stockholder is created exclusively for the benefit of corporate creditors. It is not to be numbered among the assets of the corporation, and the corporation has no right or interest in it. It cannot enforce it by an assessment upon the stockholders. Nor can the corporation, upon the insolvency, assign it to a trustee for the benefit of creditors. It is a liability running directly and immediately from the stockholders to the corporate creditors. Accordingly, a receiver of an insolvent corporation has no power to enforce such a liability as this; but in many of the states, in order to avoid a multiplicity of suits, and conflict of interest and collusive settlements and doubt as to the remedy, statutes have been passed authorizing receivers to enforce the statutory liability of stockholders. Where by a statute every creditor has the right to bring suit to enforce the stockholders' liability, a subsequent statute taking away this right and giving it to a receiver is unconstitutional. An assignee of an insolvent corporation for the benefit of its creditors cannot enforce the statutory liability of stockholders. An agent selected by the stockholders of an insolvent

national bank to wind up the bank cannot enforce the statutory liability."

Mr. Cook's conclusion that a subsequent statute taking away from the creditor and giving to the receiver the right to sue for the additional liability is unconstitutional, seems borne out by authority and upon principal. This subject is fully argued in a special brief herein on this question by Mr. Lawrence Arnold Tanzer.

If the attempt to apply the Act of 1899 to the liability of plaintiff in error is unconstitutional, or if plaintiff below has failed to state in his amended declaration a cause of action, either because he could not make the adjudication in Minnesota the basis of his suit, or because he does not show that the District Court was authorized to appoint him a receiver, or that he is entitled to sue in a foreign jurisdiction, or that plaintiff in error is liable for the claims allowed, or the expenses of receivership, or that the act of plaintiff in error in organizing the corporation and taking a part of its stock was *ultra vires*, or because the Minnesota Thresher Manufacturing Company was one exempt from the liability in question, or for any other reason mentioned in this brief, then in either of these cases the demurrer to the declaration was well taken and should have been sustained, and the judgment below should be reversed and the cause remanded, with directions to sustain the demurrer to the declaration.

Respectfully submitted,

LESTER H. STRAWN,
*For Plaintiff in Error.*

WINSTON, PAYNE & STRAWN, *of Counsel.*

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# In the Supreme Court of the United States.

OCTOBER TERM, 1905.

Office Supreme Court
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JAMES H. McKEE

## NO. 176.

FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
PLAINTIFF IN ERROR,

*vs.*

THEODORE R. CONVERSE, RECEIVER OF THE MINNESOTA THRESHER MANUFACTURING CO., DEFENDANT IN ERROR,

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

## BRIEF FOR DEFENDANT IN ERROR.

C. A. SEVERANCE,
FRANK B. KELLOGG,
ROBERT E. OLDS,
J. H. CHANDLER,
*Attorneys for defendant in error.*

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FIRST NATIONAL BANK OF OTTAWA, ILLINOIS,
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*vs.*

THEODORE R. CONVERSE, RECEIVER OF MINNESOTA THRESHER MANUFACTURING COMPANY,
*Defendant in Error.*

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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This is an action brought by the defendant in error as Receiver of the Minnesota Thresher Manufacturing Company, to recover from the defendant, a stockholder of said company, the sum of $4,932, together with interest thereon from and after the 21st day of January, 1903, upon an assessment duly levied upon all the stock of said Thresher Company and the owners thereof by the District Court for the County of Washington and state of Minnesota, said county being the place of residence and the principal office of said company. The declaration appears on pages 5 to 16 inclusive of the transcript of record. To this declaration the plaintiff in error interposed a demurrer which is

set forth on pages 17 and 18 of the transcript. The demurrer was overruled, and plaintiff in error, electing to stand by the same, judgment was entered in favor of the defendant in error and against the plaintiff in error, for the sum of $5,529.60 damages, together with costs of suit taxed and allowed at $39.10. To review this judgment, the plaintiff in error sued out the writ of error herein. Therefore the case comes on to be heard solely upon the facts alleged in the declaration and the legal consequences flowing therefrom. The order and judgment of the Minnesota court levying the assessment, is set forth in full in the declaration. See transcript, folios 25 to 27 inclusive. The declaration, after averring the citizenship of the parties and the incorporation of the plaintiff in error, states in substance that the Minnesota Thresher Manufacturing Company was duly incorporated in the state of Minnesota under and pursuant to the provisions of the constitution and laws of said state, and has since its incorporation continued to be, and still is, a body corporate; that the articles of incorporation of the Thresher Company provided that the objects for which the corporation was formed was "the purchase of the capital stock, evidences of indebtedness issued by, and the assets of the Northwestern Manufacturing & Car Company, a corporation existing under the laws of the state of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines and all kinds of farm implements, machinery of all kinds, and the manufacture and sale of all articles, implements and machinery of which wood or iron or either of them form the principal component parts."

It further appears by the declaration that the said

Northwestern Manufacturing & Car Company was a corporation engaged in the manufacturing business at Stillwater, Minnesota, and was the debtor of the plaintiff in error for money loaned to it, and that said Car Company became insolvent, and a receiver of the same was appointed; that pending the receivership, the plaintiff in error together with other creditors and certain of the stockholders of said corporation, organized the said Thresher Company, which latter company exchanged its preferred stock at par for the claims of creditors of the Car Company, and subsequently said Thresher Company purchased at judicial sale the remaining assets of the Car Company, paying for the same in part with the said claims so acquired by it, and that the plaintiff in error exchanged its said claims for money so loaned to the said Car Company, receiving therefor 274 shares of the preferred stock of the Thresher Company, and has since continued to be the owner and holder of the same.

It further appears by the declaration that the said Thresher Company thereafter became insolvent, and an action at law was brought against it by the Merchants National Bank of St. Paul, Minnesota, in which action judgment was entered, execution issued thereon and returned unsatisfied; that an action was thereupon brought by said Bank against said Thresher Company pursuant to the provisions of Chapter 76 of the Statutes of Minnesota for the year 1894, praying among other things, for the sequestration of the stock, property, things in action, and effects of said Thresher Company, and for the appointment of a receiver thereof. That jurisdiction having been obtained of the Thresher Company by the service of process upon it on the 16th day of August, 1901, judgment was

duly given, rendered and entered in and by the said District Court for Washington County, Minnesota, adjudging that the stock, property, things in action and effects of said Thresher Company be sequestrated, and the defendant in error was appointed as receiver; that the judgment of sequestration has never been appealed from, or in any manner modified, reversed or set aside. The defendant in error duly qualified, entered upon his duties, and is still acting as such receiver. That thereafter an order was made as provided by the Statutes of the State of Minnesota, Chapter 76, authorizing and requiring the creditors of said Thresher Company to become parties to said action, exhibit and prove their claims therein. Notice of said order was given as required by law, various creditors appeared, and their claims were adjudicated at the sum of $443,752.17. That Chapter 272 of the General Laws of Minnesota for 1899, provided among other things that whenever a corporation, created and existing under the laws of the state of Minnesota whose stockholders, or any of them, are liable to it or to its creditors or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to, the stock or shares at any time held or owned by said stockholders respectively, under and by virtue of the constitution and laws of the state of Minnesota, or any statute of said state or otherwise, shall have appointed for it a receiver under said Chapter 76, the District Court appointing such receiver may proceed as provided in the act. Section 2 of the act then provides that upon a petition by such receiver, the said court shall appoint a time for hearing not less than thirty nor more than sixty days from the time of filing the petition, and shall direct such notice of hearing to be given

by publication or otherwise, as the court in its discretion may deem proper. Section 3 provides that upon such hearing the court shall consider proofs that may be offered as to the probable indebtedness of the corporation, and the expenses of the receivership and the probable amount of assets available for the payment of such indebtedness and expenses, and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability, and if it shall appear to the satisfaction of the court that the ordinary assets of the corporation will probably be insufficient to pay and discharge in full the indebtedness of the corporation, and the expenses of the receivership, it shall thereupon by order, direct and levy a ratable assessment upon all parties liable as stockholders, for, upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the court in its discretion may deem proper, taking into account the probable solvency or insolvency of the stockholders and the probable expenses of collecting the assessment, and shall direct the payment of the amount so assessed against each share of stock, to the receiver within such time thereafter as said court may specify. The succeeding sections of the act provide that the order shall direct the receiver to collect the amount so assessed, and to prosecute actions either in the state of Minnesota or elsewhere, against stockholders failing to pay, and the order and assessment are declared to be conclusive upon and against all parties liable on account of any such shares of stock, whether appearing and represented at the hearing or not, as to all matters relating to the amount of and the propriety of, and necessity for, the said assessment.

It is then made the duty of the receiver to institute and maintain actions for the recovery of these assessments in the courts of any state or country where a stockholder may be, or where he may have any property subject to garnishment and attachment or other process. It is further provided by said act that if the assessment so levied shall be insufficient, succeeding assessments may be made, not exceeding, however, in the aggregate the constitutional liability of stockholders, and if more money is collected from the stockholders than is necessary to liquidate the indebtedness of the corporation and the expenses of the receivership, such excess is to be returned in the proper proportions to the stockholders who have paid the same. It is alleged in the declaration that the defendant in error as such receiver did, on the 16th day of April, 1902, duly file his petition for an assessment upon the stock, and an order was made thereon pursuant to the provisions of said Chapter 272 of the Laws of 1899. The date fixed for the hearing was June 10th, 1902. That notice of the same was duly given, and the matter was adjourned from time to time, and came on for final hearing on the 10th day of December, 1902, at which time evidence was introduced by the receiver and by certain objecting stockholders, and after oral argument by counsel, and on the 22nd day of December, 1902, the court made and entered the order set forth in the declaration. It will be seen that the order provides for an assessment of eighteen dollars on each share of the capital stock, being thirty-six per cent of the par value of each share, and it requires the payment of the same to the defendant in error as receiver, within thirty days after the date of the order, and as provided by the law, directed the receiver to proceed to collect

the amount of said assessment in case any party liable as a stockholder should fail to pay the same. That notice of the order was duly given to the plaintiff in error, but it refused and neglected to pay, for which reason judgment was asked. In view of the allegations of the declaration, it must, of course, be conceded upon demurrer, that all the successive steps required by Chapter 272 of the Laws of 1899, were duly taken.

The liability of stockholders of Minnesota corporations is fixed by Section 3 of Article 10 of the constitution of that state, which reads as follows:

> "Each stockholder in any corporation (excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

This provision of the constitution, with the exception of the portion appearing in parenthesis, has been in existence since 1858, and the exemption of manufacturing and mechanical corporations since 1870, so that the section in its present form was in force long prior to the incorporation of the said Thresher Company, or the acquisition of stock therein by the plaintiff in error. The Supreme Court of Minnesota in the cases of Willis v. Mabon, 48 Minn. 140, and McKusick v. Seymour, Sabin & Co., 48 Minn. 158, held that this provision of the constitution is self-executing so as to impose the liability upon stockholders without further legislation. In the former case, the court said, at page 154:

> "Of course, the remedy is always within the control of the legislature, and may be changed as they see fit, provided only it remains adequate. It is entirely competent for them to provide a new and statutory remedy and make it exclusive, if they see fit."

That this construction of the section of the constitution imposing the liability, is conclusive upon this court, has been establshed by many cases, notably the recent case of Middletown Bank v. Ry. Co., 197 U. S. 394. That case involved questions as to the liability of stockholders of Ohio corporations arising under the constitution of that state, and at page 404, this court said:

> "We have not been referred to any decision of the Ohio Supreme Court directly involving the question whether the provision of the constitution referred to is self-executing or not. If there were any such decision, we should follow it."

That the Minnesota Thresher Manufacturing Company is not within the exception has been specifically held in two cases, to-wit: State v. Minnesota Thresher Manufacturing Co., 40 Minn. 213; and In re Receivership of Minnesota Thresher Manufacturing Co., Theodore R. Converse, Respondent, v. D. N. Morgan et al., Appellants, 90 Minn. 144. The first case was a proceeding in the nature of quo warranto instituted by the Attorney General of the state, and the latter was the appeal taken by certain objecting stockholders from the order levying the assessment sued upon in this action. In that case the Minnesota court, at page 145, said:

> "The sole question presented for our consideration and decision is whether the stockholders of the defendant are liable for its debts to the amount of stock held or owned by them as provided by Article 10, Section 3 of our state constiution. Or, in other words, is the defendant a corporation organized for the purpose of carrying on any kind of manufacturing or mechanical business within the meaning of the constitutional provision referred to? The answer to the question de-

pends upon the construction to be given to the articles of association of the defendant."

The court then quoted from the articles of association the portion reciting the purposes for which it was organized, and after holding that the character of the corporation must be determined solely by a construction of the articles themselves, held that the purposes stated included other classes of business than manufacturing or mechanical, and for that reason the stockholders were liable. Many earlier cases were cited in the opinion to which we invite the attention of the court. As this decision is one strictly involving the construction of the constitution and laws of the state of Minnesota, it is, of course, conclusive upon all other courts, and the argument in the brief of the plaintiff in error, to the effect that the Thresher Company was a purely manufacturing corporation, may be considered as disposed of without further mention.

Different methods of enforcing the liability so created by the constitution have been at different times enacted by the legislature of the state of Minnesota. Certain provisions of Chapter 76 of the General Statutes of 1894 were in force at the time of the organization of the Thresher Company, and are still unrepealed. It was held in Allen v. Walsh, 25 Minn. 543, that the only remedy prescribed by statute for the enforcement of stockholders' liability was contained in said Chapter 76.

It is true that in that case the court had under consideration a liability created by the statute relating to banks, and not the constitutional liability applicable to all corporations. It was there held that the constitutional provision did not prevent the enactment by the legislature of statutes providing for additional stockholder's liability, but only

that the liability could not be diminished below the amount provided by the constitution. A statute had been passed making stockholders in banks liable to double the amount of stock owned by them, instead of the single superadded liability under consideration here. And, at page 556 in the opinion, the court held that Ch. 76, which gave the remedy, was a part of the General Statutes of 1866, which also contained the enactment that created the statutory liability; and, for that reason under the rule that when a statute which creates a right also prescribes an adequate remedy, the latter is to be deemed the exclusive one, it was held that the sole remedy for the enforcement of the stockholder's liability, so far as banking corporations were concerned, was Ch. 76. That having proved a fairly satisfactory remedy in the early days of the State, when corporations were small and as a rule controlled by local stockholders, it was afterwards treated as the sole method of enforcing the stockholder's liability, not only such as arose under the banking statute but, under the constitution.

These sections of the statute, however, did not vest in the receiver therein provided for, the title to the liability as trustee for the creditors. See.

Hale v. Allinson, 188 U. S. 56.

Palmer v. Bank of Zumbrota, 65 Minn. 90.

Minneapolis Base Ball Co. v. Bank, 66 Minn. 441.

And hence, stockholders who could not be served with process and brought into court in the proceeding in Minnesota for the enforcement of the liability, in many cases escaped payment of the obligation they assumed under the constitution when becoming stockholders. For the purpose of providing a better method of enforcing the liability

the legislature of the state of Minnesota enacted Chapter 272 of the General Laws of 1899, heretofore referred to and quoted from. This act is entitled "An Act to provide for the better enforcement of the liability of stockholders of corporations." Confusion has resulted at times, and that difficulty does not seem entirely absent in the briefs filed here by the counsel for plaintiff in error, through failure to recognize the fact that the liability of stockholders in Minnesota corporations is created solely by the constitution, and that both the provisions of Chapter 76 of the General Statutes, and the practice act of 1899, pertain only to the remedy, and neither purport to, nor do they in fact, create the substantive right upon which suits against stockholders are based, that right being created entirely by the self-executing provision of the constitution. This distinguishes cases arising under the Minnesota constitution from those which involve a construction of the constitution or statutes of other states, notably the state of Kansas, where it has been specifically held by the Supreme Court of that state that the constitutional provision imposing liability is not self-executing, but requires the aid of legislation to create the right as well as the remedy.

Woodworth et al. v. Bowles et al., 61 Kansas 569.

In that case the Supreme Court of Kansas, by a unanimous decision, held that the provision of the constitution of that state, Article 12, Section 2, reading: "Dues from corporations shall be secured by individual liabilty of the stockholders to an additional amount equal to the stock owned by each stockholder, and such other means as shall be provided by law," was not self-executing, but required legislative action to give it effect. Among other things,

the court in its opinion says:

> "But we are constrained to hold that the constitutional provision in question is not self-operative. It does not execute its own commands, and can only be regarded as a direction to the legislature. As a rule, constitutional provisions, unless expressed in negative form, or possessed of a negative meaning, are not self-assertive. They usually assume the form of a command to the legislature, and legislative action becomes necessary to give them effect. The one under consideration is an instance of the latter kind. The constitution does not ordain in terms of the present tense the individual liability of stockholders for the debts of corporations, but it ordains it in terms of the future tense. It declares that 'dues from corporations shall be secured,' not that 'dues from corporations *are* secured.' When the constitution declares that a right shall be secured or a thing shall be done, it means that it shall be secured or shall be done by the legislature. In such case the constitution places upon the legislature the obligation to carry out its ordinances by appropriate enactment."

This court cited Woodworth v. Bowles on this point in Ward v. Joslin, 186 U. S. 150.

We shall have occasion in another portion of the brief to again refer to this Kansas case, but we merely cite it at this time to emphasize the fact that the liability and obligation of stockholders of Minnesota corporations is, and always has been, created solely by the constitution, and does not, and has never had its foundation in any statutory enactment; and therefore, deductions which may be attempted from decisions in cases arising out of the insolvency of Kansas corporations or corporations of any other state where the liability is created by the same stat-

ute which furnishes the remedy, have no application whatever to the questions at issue in this proceeding. Several minor questions which can be answered in a few lines, are suggested in the elaborate briefs filed by counsel for plaintiff in error, and by another counsel *amicus curiae,* but the principal argument is devoted to a discussion of the question as to whether Chapter 272 of the Laws of Minnesota for 1899 is a constitutional enactment as to stockholders who acquired their stock prior to its passage. If the said act is constitutional, it is claimed, although not at all vigorously, that the receiver Converse is, nevertheless, not entitled to maintain an action for the recovery of the assessment in question outside the jurisdiction in which he was appointed. It is also suggested, although not argued at length, that the acquisition of the stock in question by the plaintiff in error, which is a national bank, was *ultra vires,* and that therefore, it cannot be held liable as a stockholder. We will therefore consider these questions in the order in which we have stated them.

FIRST, CHAPTER 272 OF THE LAWS OF MINNESOTA FOR 1899, IS CONSTITUTIONAL AS TO ALL STOCKHOLDERS WHETHER THEIR STOCK WAS ACQUIRED BEFORE OR AFTER ITS ENACTMENT.

SECOND, THE DEFENDANT IN ERROR AS RECEIVER HAVING, BY VIRTUE OF THE STATUTE TITLE TO THE FUND IN QUESTION, IS ENTITLED TO SUE FOR THE SAME IN HIS OWN NAME IN ANY JURISDICTION.

THIRD, THE PLAINTIFF IN ERROR, HAVING TAKEN THIS STOCK IN THE ENDEAVOR TO SAVE ITSELF FROM LOSS UPON A LOAN PREVIOUSLY MADE IN THE REGULAR COURSE OF BUSINESS, ACQUIRED THE SAME LAWFULLY, AND IS SUBJECT TO THE SAME LIABILITIES AS ANY OTHER STOCKHOLDER.

## FIRST.

### CHAPTER 272 OF THE LAWS OF 1899, IS CONSTITUTIONAL.

We regard this question, as well as the right of the receiver to sue outside the state in which he was appointed, as having been already determined by this court favorably to the contention of the defendant in error. In the case of Hale v. Allinson, 188 U. S. 56, the court had under consideration the right of Hale as receiver to maintain an action in the Circuit Court of the United States for the District of Pennsylvania, to recover the amount of stockholders' liability owing by the defendant because of the insolvency of a corporation of the state of Minnesota in which he owned stock. The case arose prior to the passage of the law of 1899, which is in part set forth in the declaration herein. Therefore, the only method of enforcing stockholders' liability was under the provisions of Chapter 76 of the General Statutes of 1894. This is stated by the court in its opinion, the constitutional provision and various sections of the statutes being set forth upon the margin at pages 59 to 61 inclusive. In that case the facts were that the corporation having become insolvent, a certain

trust company was appointed receiver of the corporate assets, and proceeded to the discharge of its duties as such. A creditor of the corporation filed a bill under Chapter 76, making the company and all its stockholders defendants, in which action he prayed for enforcement of the stockholders' liability. The creditors of the loan company came in and proved their debts, but the non-resident stockholders, not having been served with process, did not appear. A judgment was entered that the resident stockholders were liable to the extent of the par value of the stock for the debts of the company. The judgment of the court also provided in substance that for the purpose of enforcing and collecting the judgments against the resident stockholders and any and all liability on the part of non-resident stockholders against whom no personal judgment for the ascertained liability was rendered, the plaintiff Hale was appointed receiver, and he was authorized and directed to begin suits against any non-resident stockholders to collect the stockholders' liability. An inspection of the provisions of Chapter 76, and of the order appointing Hale as receiver, which appears on page 58 in the statement of the case, will disclose that his authority was founded solely upon the order of court appointing him. Therefore, this court properly held, following the Minnesota decisions, that such a receiver could not maintain an action to recover stockholders' liability either within or without the state of Minnesota. This case was argued on November 6th and 7th, 1902, and decided on January 19th, 1903. On the same day the court refused a writ of certiorari prayed by Hale, in which he sought to review a judgment of the Circuit Court of Appeals for the Second Circuit, which had denied his right to recover stockholders' liability from

one Hilliker. See 188 U. S., page 739. This denial of certiorari to Hale was, of course, inevitable in view of the decision in Hale v. Allinson, as the two cases involved the same question, and the decision of the Circuit Court of Appeals for the Second Circuit having been in harmony with the decision of this court in Hale v. Allinson. But there was pending in this court at the same time, the petition of one Burget for a writ of certiorari to the United States Circuit Court of Appeals for the First Circuit, by means of which Burget, who was a stockholder in a Minnesota corporation, sought to review a judgment rendered against him in the United States Circuit Court for the District of Massachusetts, and affirmed by the Circuit Court of Appeals of the First Circuit, in which one Robinson as receiver, had sued to recover the amount of an assessment made by a Minnesota court under said Chapter 272 of the Laws of 1899. On the same day that this court decided Hale v. Allinson and Hale v. Hilliker, it denied the petition of Burget for certiorari, 188 U. S. 739, thus necessarily holding that the law of 1899, under which the assessment upon which Burget was sued, was constitutional and valid, and that the receiver had the right to sue outside of the state of Minnesota to recover the amount of the assessment. In the brief filed by Mr. Tanzer herein, it is claimed that this constitutional question was not involved in the denial of that application for certiorari. That the matter was directly involved is, of course, without question; that it was brought to the attention of this court both by the petition and by the brief filed in opposition thereto on behalf of Robinson the receiver, likewise clearly appears.

In the petition of Burget, which is numbered 443, Octo-

ber Term, 1902, he prays for certiorari,

"9th. Because to hold that resident stockholders are necessary parties to such action and that non-resident stockholders are not necessary parties, works an unjust discrimination against the latter in that it fixes their liability in their absence without notice, and excludes the right of contribution to other stockholders."

"10th. Because such a construction of the Minnesota staute means in substance and effect the rendering of a judgment against a non-resident stockholder in an action where he was not made a party."

"11th. Because such a construction of the statute prescribes one form of remedy for resident stockholders, and another form of remedy for non-resident stockholders. For the resident stockholder it prescribes an equitable proceeding in which the rights, equities and liabilities of all parties in interest may be finally adjudicated. For the non-resident stockholder it prescribes an action at law in a foreign jurisdiction in which his super-added liability as a stockholder having been already determined in a prior action in his absence, his only defense is to show that he was not a stockholder or that he had other defenses of a personal nature."

"12. Because a suit by a creditor to enforce the double liability of stockholders under the Minnesota statute is not analagous to a suit for the assessment of unpaid stock subscriptions, because the latter is a corporate matter merely involving a corporate duty, whereas the former is not a corporate matter, and involves no corporate duty. The assets are not corporate assets, but a trust fund for the payment of creditors after the corporate assets have been exhausted."

"13th. Because a judgment against a corporation after insolvency proceedings and the appointment of a receiver, is not binding upon the stockholder, and

can be inquired into in the proceeding to enforce his super-added liability."

"14th. Because there is no inherent power in the legislature of Minnesota to give its officer extra territorial rights or powers or to enable him to exercise his functions or bring suits in a foreign jurisdiction."

* * *

"16th. Because the statute providing for the super-added liability of stockholders was not in force at the time of the organization of the L. D. Kilbourne Boot & Shoe Co. and the acquirement of the defendant's stock."

The petition for certiorari further disclosed that the corporation in question there, was incorporated in 1887; see page 2, petition; that at all times during its corporate existence the petitioner Burget was a stockholder. It also clearly appeared by the petition that the suit was brought by the receiver upon an assessment ordered by the District Court of Hennepin County, Minnesota, upon all parties liable as stockholders pursuant to the provisions of Chap. 272 of the Laws of 1899. Therefore, it is apparent upon a mere inspection of the petition that counsel is mistaken in his statement that the constitutional question was not directly raised upon this petition for certiorari. Practically every suggestion that has been made here bearing upon the question, appears in the petition. If anything more was the case, it clearly appears by the brief of respondent in necessary to show that this court considered this feature of opposition to the petition for certiorari, at pages 22 to 24, where counsel for the receiver pointed out that the liability of stockholders of Minnesota corporations rests wholly upon the provision of the Minnesota constitution and is not created by, nor dependent upon any statute at all, that

there have been various statutory changes of procedure, and that it was plain that the law of 1899, under which the assessment in question was made, operated merely upon the remedy, but did not in any manner affect the liability itself. Counsel urged that the question was not properly before the court, but argued the question as though it had been, calling attention to many cases, some of which we will discuss hereafter, and enforcing the point that the law of 1899 went merely to the remedy. Therefore, the question was directly raised and argued, and it seems to us unbecoming to suggest that this court would refuse relief to the stockholder Burget, if it had the impression that he was being mulcted under an unconstitutional law, where the alleged unconstitutionality of the act was squarely brought to the court's attention and argued.

A history of the case throws further light upon the question. At the same time that Robinson sued Burget, he also sued one Brown and one Wellington. The actions were tried together, and the opinion of the court is reported in 126 Federal, page 429. At page 430, the court said in its opinion:

> "The defendant's answer set up several defenses, of which the following were insisted upon in argument: First, that the receiver has no right to maintain these actions, because Chapter 272, p. 315, Laws 1899, by virtue of the provisions of which he was appointed, was passed after the incorporation of the Kilbourne Co. and after the defendants became stockholders therein. This point was expressly disposed of by the Supreme Court of Minnesota in the case above cited (Straw & Ellsworth Manufacturing Co. v. R. L. Kilbourne Boot & Shoe Co., 83 N. W. 36), and, so far as that decision construes the constitution and laws of

Minnesota, it is binding upon this court. So far as it determines that the act of 1899 is not in contravention of the constitution of the United States, the decision is not absolutely binding upon this court, though it should receive from this court the fullest consideration and respect. Independently of the authority properly attached to the decision, this court is disposed to agree with its conclusions upon the point just stated, and holds that the receiver is not hindered by the federal constitution from bringing these actions against these defendants."

This opinion was filed on May 28th, 1901. The case was reviewed in the Circuit Court of Appeals, and the opinion is found in 113 Federal, page 669. Among other things, the court says:

"With the exception of a single particular, the case involves questions disposed of by us in Hale v. Hardon, 37 C. C. A. 240, 95 Federal, 747, and is determined by it. It is not necessary to consider the proposition made by the defendant below, that certain legislation of Minnesota subsequent to his acquiring the stock in the corporation in question, is ineffectual, because, independently of that, the principles asserted in Hale v. Hardon are sufficient to sustain the judgment, unless the defendant below is entitled to an off-set as a general creditor of the corporation. He is admittedly a general creditor for a larger amount than that claimed from him as a stockholder. Nevertheless, in order to lay the foundation of a right of set-off either at law or in equity, the claims pro and con must be in the same interest. A trustee, enforcing a claim in behalf of his trust, is not subject to set-off of the claims of the debtor of the trust against the trustee individually. In the present case, the plaintiff below stands as the representative of the creditors

> of the corporation, and not of the corporation itself, so that the cross demands are not in the same interest within the rules applicable to set-offs."

It thus appears that the constitutional question was argued in the Court of Appeals, but that court, under the rule laid down in Hale v. Hardon, 95 Federal, 747, felt that Robinson was entitled to recover irrespective of the new statute. This was the state of the case when the petition for certiorari was filed. After the denial of the writ by this court, Burget went back to the Court of Appeals of the First Circuit, and filed a petition for a re-hearing, because of the expressions of this court in Hale v. Allinson. That was fully argued, the counsel for the receiver presenting an elaborate brief upon the constitutional question, because they realized that unless that act was held valid as to parties like Burget, who had acquired their stock prior to its passage, they could not maintain their action. The re-hearing was denied upon the merits, and the case is reported in 123 Federal, page 262. At page 267 the court said:

> "Of course exceptional cases may arise, where, in accordance with the practice of the Supreme Court, which ordinarily refuses a petition for certiorari in the early stages of a case, or in some other way, the fact is disclosed, wherever it can be, that that court has not impliedly passed on any issues raised before us. These exceptions do not apply to the present case, because our judgment was final, and also because, apparently, the Supreme Court gave the subject-matter of the petition for certiorari grave consideration. It was filed, as we have said, on October 20, 1902, and not denied till January 19, 1903, while on the same day, that court passed down the opinion in Hale v. Allinson, to which we have already referred.

Moreover, notwithstanding the expression found in our opinion which we have already cited, to the effect that, we observed that, with the exception of a single particular, the case involved questions disposed of in Hale v. Hardon, there was none that there were not other questions involved; and such a statement would not have been correct if it had been made. Hale v. Hardon, like Hale v. Allinson, was based entirely on General Statutes Minnesota 1894, Chapter 76, as pointed out by the opinion of the Supreme Court in the latter case. But the present plaintiff relies both on that statute and on the alleged authority and rights given him by Chapter 272, page 315 of the General Laws of Minnesota for the year 1899, the details of which it is not necessary to recite, except to state that the plaintiff claims that the act of 1899 vested in him a certain title and interest in addition to any rights which could arise under General Statutes of 1894. Nevertheless, inasmuch as the briefs show that, at the trial before us, the defendant conceded that, if Hale v. Hardon should be followed, the right of action of the present plaintiff must be sustained, it was not necessary for us to go beyond the rule established in that case. The Supreme Court, however, in Hale v. Allinson, rested one view of the case strictly upon the General Statutes of 1894. While it dwelt on the fact that as, according to the judicial decisions in Minnesota, the plaintiff Hale could not, as receiver, have maintained a suit in his own name in the courts of that state, he could not have any greater rights in foreign courts, yet, in addition thereto, the court observed with reference to his official character, as follows: 'Assuming the contractual character of the subscription to the stock of the corporation, the right of the receiver to maintain this suit is not thereby made plainer. The contract may have been to pay, in the event of its insolvency, to the creditors of the corporation the

amount for which the shareholder might be liable up to the par value of his stock. That was a contract in behalf of the creditor, with which the corporation had nothing to do, and the statute did not make this liability assets of the corporation, or confer upon any receiver appointed in the case, the right to proceed to enforce it. The cases of Whitman v. Oxford National Bank, 176 U. S. 559, and Hancock National Bank v. Farnum, 176 U. S. 640, do not bear upon the question as the plaintiff in each case was the creditor of the corporation.' Referring to the expression, 'the statute did not confer upon the receiver the right to proceed to enforce the liability of stockholders,' the statute of 1899, is, perhaps, susceptible of a different construction; indeed, of such a construction as to bring this case within Relfe v. Rundle, 103 U. S. 222, which the Supreme Court also refers to."

The opinion then goes on to discuss the rules of this court in the consideration of writs of certiorari, and referring to In re Woods, 143 U. S. 202, said:

"There it is said that the power of issuing writs of certiorari was given by the act of March 3, 1891, as a provision for such supervision 'as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters.' It is, therefore, unsuitable to presume that the Supreme Court entertained a petition for a writ in Hale v. Allinson, and entered judgment therein against the receiver, but refused the writ in the present case, and yet had any impression that the two involved the same question, and thus practically induced the very 'diversity of judgments' which it says it was the purpose of the statute to avert. On the whole, for us to assume to reconsider questions which the Supreme Court has had an opportunity to reconsider in the identical case and on the

identical record, and refused to reconsider, would ordinarily involve grave impropriety. *Aside from that, we can perceive in this particular instance nothing which calls on us to do so.*"

(The italics are ours.) In view of the last sentence, which we have italicised, it will, of course, be conceded, that the Court of Appeals of the First Circuit, composed of Circuit Judges Colt and Putnam, and District Judge Aldrich, have squarely held the law of 1899 constitutional as to stockholders who acquired their stock previous to that time, the matter having been directly presented and fully and exhaustively argued, and in addition to that, it was the opinion of that learned court that the denial of the writ of certiorari to the stockholder Burget by this court, involved the same decision. To emphasize the matter still further, it appears by papers in the office of the clerk of this court, that on the 15th day of May, 1903, two weeks after the decision of the Circuit Court of Appeals refusing a re-hearing, Burget, being still under the impression that he was wronged by the series of decisions against him, handed to this court another petition, in which he prayed for a re-hearing of his application for certiorari. This petition was distributed to this court on the 15th day of May, 1903, and on the first day of June, 1903, it was denied. This denial does not appear in the published reports for the reason, as we are informed, that under the practice, such applications are treated informally, and are not permitted to be filed unless granted, but the petition is in the office of the clerk. In this last petition Burget, after calling attention to the filing and denial of his petition for certiorari, and to the application to the Circuit Court of Appeals for re-hearing, and the dismissal

of said application with a copy of the opinion of the Court of Appeals refusing the rehearing annexed to his petition, sets forth that he has no further remedy in said Circuit Court of Appeals, and then asks for a rehearing of his petition for certiorari upon sixteen different grounds, a portion of which are as follows:

"2. Said decision of said Circuit Court of Appeals is at variance with the later decision of this court, viz: Hale v. Allinson et al.

4. By the law of Minnesota or the decree herein—the receiver is not given power to represent the creditors.

5. Or to maintain as representative, owner, or trustee an action inside or outside the state.

6. This is the right of the creditors themselves.

7. The contract which the petitioner made, to pay, in the event of insolvency, to the creditors of the corporation, is a contract in behalf of the creditors, with which the corporation has nothing to do.

8. The Minnesota legislature did not have power to interfere with this contract.

9. Nor make it assets of the corporation.

10. There is no transfer of any right or title to the receiver to enforce the liability as to a non-resident stockholder.

11. This is not a case where there has been an assignment of such right by creditors.

12. The receiver herein is not an assignee of the persons interested in the recovery from the stockholders.

13. This receiver had no extra-territorial power of official action, none which the court appointing him can confer with authority to enable him to go into a

foreign jurisdiction to take possession of the debtor's property; none which can give him upon the principle of comity a privilege to sue in a foreign court of another jurisdiction, as the judgment creditor himself might have done.

14. All non-resident stockholders were but nominal parties to the Minnesota suit; no service of process was made on one of them, as the suit was not one in which service by publication of process could be ordered.

15. The court could enter no judgment against them.

16. The case at bar was not ancillary to the Minnesota decree for the purpose of enforcing it, for there was no decree against the petitioner to enforce."

Attention is then specifically called to the fact that the Court of Appeals in its opinion denying a re-hearing, says that the "plaintiff relied on the alleged authority and rights given him by Chapter 272, 1899, of the General Laws of Minnesota," and the petition concludes as follows:

> "It is a question of grave and general importance whether a citizen of Massachusetts should stand equal before the law with citizens of Pennsylvania. The defendants in Hale v. Allinson et al, were citizens of the latter commonwealth."

The denial of this petition ended the litigation for Mr. Burget, and having paid his liability to the receiver in that case, by reason of the successive decisions in favor of the right of such receiver, so rendered not only by the Circuit Court and the Circuit Court of Appeals, but by this court, we are of opinion that he would find it rather hard to agree with the statement of counsel who has been permitted to file a brief in this case, that the constitutionality

of Chapter 272 of the Laws of 1899, is still open and undetermined. But if it be conceded that the question is still undecided in this court, it seems to us very clear that the law is in all respects constitutional.

(*a*) CHAPTER 272 OF THE LAWS OF 1899 DOES NOT IMPAIR THE OBLIGATION OF A CONTRACT.

The constitutionality of the act in question, as applied to stockholders who had acquired their stock previous to its enactment, has been twice affirmed by the Supreme Court of Minnesota. There are two reasons why the decision of that court is entitled to more than the usual weight given to the decisions of courts upon constitutional questions: (1st). Because the decision of the Minnesota court, holding that the new practice act does not enlarge the liability of the stockholder under previously existing remedies afforded by the statute in Minnesota, involves the consideration of what the liability of the stockholder really is in Minnesota; and, whether there is a substantial change in the liability by reason of the method of enforcing the same, created by the new law. Under the familiar principle that the decisions of the court of last resort of a state are to be followed insofar as they construe the constitution and laws of that state, it would seem that the ruling of the Minnesota court should be conclusive. But (2d), even if this court should, as did Judge Lowell in *Robinson v. Brown*, regard it as a question arising under the constitution of the United States, it is to be noticed that the Minnesota constitution, Section eleven of Article one, contains the same prohibition against the passage of

any law impairing the obligation of contracts that is found in Section ten of Article one of the constitution of the United States. Therefore the decision of the Minnesota court upon that constitutional question must be most persuasive in any event. The two cases in which Chapter 272 of the Laws of 1899 has been held constitutional are:

Straw & Ellsworth Mnfg. Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125.

London & North West American Mortgage Co. v. St. Paul Park Improvement Co., 84 Minn. 144.

The former case involved the identical assessment sued upon in the case against Burget, which came to this court upon petition for *writ of certiorari*. The defendant corporation was declared insolvent in 1897, in proceedings instituted under Chapter 76 of Gen. Stat. 1894—the same chapter under which the defendant in error, Converse, was appointed. In the opinion, at page 131, it is stated that, upon the hearing, certain stockholders appeared, and objected, among other things, that the statute in question was unconstitutional, and that the court had no jurisdiction. After hearing the testimony, the court overruled the objections, and entered an order of assessment, which, aside from the recitals of the jurisdiction, the service of notice, and the amount per share assessed, is identical in language with the one sued upon here, and at pages 136 and 137 the Supreme Court said:

> "There is no merit in the claim of counsel that the statute of 1899 impairs the obligation of a contract because, as to stockholders who became such prior to its passage, it makes a radical and unwarranted change from the former practice of an action in equity to enforce the shareholder's double liability. The

power of the legislature to modify or change a remedy, provided no substantial right is impaired, cannot be questioned. And there is no such thing as a vested right to a particular remedy. The legislature may always alter the form of administering right and justice. *No substantial right is affected by the law in question, for in no manner does it increase the liability of the stockholder.* It may afford a new remedy—a different course of procedure—but this fact does not make it obnoxious to the fundamental law which forbids the impairment of contracts."

*The italics are ours.

The court then quotes at length from Commonwealth v. President, 3 Allen, 42, 44, where the Supreme Judicial Court of Massachusetts sustained a similar change in remedy, which case we will hereafter consider more at length.

It will be observed that in this opinion, the Supreme Court of Minnesota has held *as a fact* that the liability of the stockholder is in no manner increased. Considerable space is used in both the briefs filed on behalf of the plaintiff in error, in the endeavor to show that there has been some enlargement of the liability of the shareholder. It would seem that the construction of the act by the Minnesota court which, in arriving at its conclusion, must have construed not only the section of the constitution creating the liability, but all legislation subsequent thereto and prior to the enactment of Chapter 272 of the Laws of 1899, providing a remedy, should be conclusive upon all courts. Owing to the importance of this question, the Minnesota court permitted it to be reargued, in London & North West American Mortgage Co. v. St. Paul Park Improvement Co., 84 Minn. 144, and, in the opinion at page

150, reaffirmed its previous conclusion in the following language:

> "The first and important question is whether the act under which the assessment was made (Laws 1899, c. 272) is constitutional. We held that it was in the case of Straw & Ellsworth Mnfg. Co. v. L. D. Kilbourne B. & S. Co., 80 Minn. 125. But, in view of the great importance of the question, we permitted it to be fully reargued in this case. We have given the able argument and exhaustive brief submitted on behalf of the appellants the consideration the importance of the question demands. We are not, however, convinced that the former decision was wrong. We adhere to it, and hold the act constitutional."

Both of these decisions expressed the unanimous opinion of the court.

It is clear that the Minnesota court was entirely justified in holding that the liability of the stockholder was in no way increased. We have heretofore shown that the liability is created solely by the constitution, which is self-executing. The language of this provision (section 3, article 10), together wth the title to said section, are very significant. The section is entitled, "Liabilities of Stockholders;" and the section reads: "Each stockholder in any corporation * * * shall be liable to the amount of stock held or owned by him." This court will observe that the title is in the plural. This language differs materially from that of the constitution of Kansas, which has been so often under consideration by this and other courts, where the stockholder is rendered liable only *for the dues* of the corporation. Here it is apparent that, by becoming a stockholder, he makes a contract with the corporation, by which he agrees to pay such sum for or on account of the corpora-

tion or its creditors, up to the maximum provided by the constitution, as may be necessary to satisfy, not only the debts owing to creditors, but such sums as may be necessary to pay the expenses of completing the administration of the estate of the corporation in case of insolvency. The liability arises from the voluntary action of the shareholder in becoming such, that is, from his contract of membership in the corporation. By that act the liability attaches to him during the existence of the contract. There is only one contract; that is with the corporation itself, to-wit: this contract of membership. By that contract the shareholder puts a certain amount of capital into the business, and agrees to be liable for as much more, if need be. The executory part of this contract is in the nature of a contract of suretyship or guaranty.

In Willis v. Mabon, et al, 48 Minn. 140, the court considered, among other things, an amendment to the insolvency laws of the State of Minnesota which provided "that the release of any debtor under this act shall not operate to discharge any other party liable as surety, guarantor or otherwise for the same debt;" and the court said, at page 156:

> "But even under the strict doctrine of *ejusdem generis*, we have no doubt that the term 'or otherwise' would embrace those liable as stockholders for corporate debts; for, while that liability is *sui generis*, yet it is in many respects sufficiently analogous to that of surety or guarantor to fall within the same general class."

This contract of suretyship or guaranty is made for the benefit of the corporation and its creditors; that is, it is to make good a deficiency of the corporate assets in case of

need. There is no contract made directly with the creditors, but merely with the corporation for the benefit of such persons as may from time to time become creditors. The beneficial interest in this liability is in the creditor, to the extent of his debts, and of the expenses of liquidating and managing the estate and collecting in the assets. As the enforcement of this liability never arises until after insolvency, the funds collected from the stockholders become necessarily a part of the assets of the insolvent corporation in the hands of the court or the receiver, for distribution among the creditors, after deducting expenses.

Under all systems adopted for the liquidation of corporations and the distribution of their assets, it is inevitable that the expenses attending the gathering in of the assets and the distribution of the same, including allowances to court officials, attorneys and other employes, must be paid out of the assets of the estate. There is no other way in which corporations can be wound up. There is no other fund out of which these expenses can be met. That such disbursements may be incurred is necessarily known and assented to by the stockholders when they organize or become members of the corporation; that such expenditures cannot be uniform in all cases is evident; that as different forms of remedies may be enacted from time to time, these legal expenses may be increased or diminished, is equally evident.

The stockholders agree in consideration of their limited liability that the state may, from time to time, establish and change the methods of liquidating the corporation.

The necessary expenses of enforcing the stockholders' liability stand upon no different ground in principle than the like expenses incurred in collecting in other assets of

the corporation. The creditors receive the net result of all the proceedings taken to liquidate the affairs of the corporation. If counsel's position is correct, it would impair the stockholders' obligation if the legislature should pass a law giving a receiver compensation at a certain rate per cent upon all of the ordinary assets of the corporation he reduced to cash, because some court, unhampered by the statute might have allowed in the case of previous trusts a less compensation. So long as the expenses in question are incidental to the remedy, they are not in any way affected by the constitutional provision against impairing the obligation of contracts.

They are naturally obligations chargeable upon the corporation, and the stockholders are sureties for the benefit of creditors to the extent of whatever deficiency may exist in the corporate assets after deducting administration charges not exceeding the limit of the liability fixed by the constitution.

In Minneapolis Base Ball Co. v. City Bank, 66 Minn. 444, the court clearly pointed out that the fund arising from the enforcement of the stockholder's liability, under the old law, was in effect a corporate asset, although not technically so; and stated that it is within the capacity of the legislature by statute to vest in the receiver the enforcement of the liability, thus making it actually a corporate asset. The court said:

> "As to the liability of stockholders for the corporate debts, it is not, and never was a corporate asset, for it is due directly to creditors, and that the receiver cannot enforce it, *in the absence of a statute authorizing him so to do.* If it be desirable, in order to secure a speedy, economical

and practical method of enforcing the liability to invest the receiver with such power, *it must be done by statute.* This has already been done in cases where the receiver of an insolvent banking corporation is appointed on the application of the superintendent of banks. Such a receiver is expressly authorized to enforce the individual liability of stockholders. Laws of 1895, c. 145, § 20. While the liability of the stockholders must be enforced on the application of creditors, and not on that of the receiver, except in cases where the statute otherwise provides, yet it does not follow that the trial court has not the same control of the litigation as if it was conducted by the receiver."

In Richmond v. Irons, 121 U. S. 27, this court, in considering the liability of shareholders in a national bank, say, at page 50:

"Admitting that this liability is not strictly an asset of the bank because it could not be enforced for its benefit as a corporation, nor in its name, yet it is treated as a means of creating a fund, to be applied with and in aid of the assets of the bank toward the satisfaction of its obligations. The two subjects of applying the assets of the bank and enforcing the liability of the stockholders, however otherwise distinct, are, by the statute, made connected parts of the whole series of transactions which constitute the liquidation of the affairs of the bank."

In Howarth v. Lombard, 175 Mass. 570, which was a suit brought by the receiver of a corporation of the State of Washington to recover a stockholder's liability, against a shareholder residing in the State of Massachusetts, the court, at page 578, said:

"In Cole v. Satsop Railroad, 9 Wash. 487, and Hardin v. Sweeney, 14 Wash. 129, it is held that the

receiver is the only person who can collect this fund. This is equivalent to saying that it can be collected only of those who are stockholders at the commencement of the proceedings, *and that while it is not in the narrow sense an asset of the corporation, it is an asset to be used by the receiver and the court* for the benefit of the corporation and of the creditors, in administering the affairs of the corporation."

The form of the remedy, whether the proceeding be instituted in the first instance by a creditor on behalf of himself and all other creditors, to require this money to be paid into the estate—the creditor having the right to maintain this action in equity as a beneficial owner—or, whether the proceeding be by the receiver as the successor of the corporation and the creditors representing all parties, is immaterial so far as the extent of the liability is concerned. It does not increase the amount the stockholder has to pay whether the receiver sues at law as the statutory successor or substituted promisee under the contract entered into by the shareholder when he became such, or, whether the action be an equitable one in the first instance, brought by the beneficial owner of the fund, the creditor. There was no actual change made by the law of 1899 in the contract itself.

Counsel fall into error in their briefs by constantly referring to the liability on the part of the shareholders as ratable, one with the other. See First Nat. Bank of Winona v. Winona Plow Co., 58 Minn. 167; Harper v. Carroll, 66 Minn. 487.

In the former case the court said, at page 173:

"Neither the constitution nor the statute provides that the stockholder's liability shall be only ratably to the amount of his stock, but 'he shall be liable to the

amount of stock held or owned by him.' This is the limitation on his liability, and the court cannot add by construction the additional limitation that he is liable only 'ratably' when some of the stockholders are insolvent or beyond the jurisdiction of the court."

So that the new law, which provides that the court shall take into account, in fixing the amount of the assessment, the probable solvency or insolvency of shareholders, is no new departure. The Winona Plow Company case was under the old practice, and the limit of the liability has always been that fixed by the constitution. And, as said by the court, it is beyond the capacity of the court to make the liability ratable, or to reduce or limit the liability in that manner.

Then again, in Harper v. Carroll, supra, which was also under the old procedure, it was held to be proper practice to enter judgment in the first instance against each shareholder for the total amount of his liability, and issue successive executions for portions of this amount until the debts were paid and the expenses liquidated. The court said, at page 493:

"It is contended that such judgment is the final adjudication of the rights of the parties, and that the court should, before the entry of judgment, determine which stockholders are solvent and which are insolvent, and order judgment against each of the solvent stockholders for his pro rata share of the whole balance of the corporate indebtedness, to be apportioned among such solvent stockholders in proportion to the amount of stock held by each.

"We cannot agree with appellants. This would leave the creditors to incur the risk, not only of an erroneous decision on the part of the court that some

stockholders were solvent who were in fact insolvent, but also the risk of some stockholders becoming insolvent between the time the court ordered judgment and the time of entry thereof or levy of execution. After the court determines who are and who are not solvent stockholders, appeals may be taken which will delay the entry of judgment or issue of execution for months and even years. When the time finally arrived when the creditors could issue execution, they might find many to be execution-proof whom they had always regarded as solvent. If the creditors took all of these risks, it would often happen that they would find themselves unable to collect one-half their claims when they came to test by execution the solvency of the stockholders found by the court to be solvent. * * *

"Conceding that the liability of the stockholders is only secondary, and that in some respects they may be regarded as sureties, each to a limited amount, for the corporate indebtedness, and are only liable for the balance remaining unpaid after the corporate assets are exhausted, in what other kind of a case is the creditor required to take such risks in the entry of judgment against the sureties for his principal debtor, as appellants insist that these creditors should take, and why should they be required to take these risks in such a case as this? In what other instance is the surety given a chance to escape a part of his liability to the creditor by any doctrine of apportionment of the indebtedness between him and his co-sureties? It is clear that the creditors in this case cannot be required to take any such risks."

So the court approved of the entry of judgment in the first instance for the full amount of the constitutional liability, or, as it was in that case, the statutory liability of banks, which is double the constitutional liabil-

ity of shareholders in other corporations, but which was enforced by the same method, under Chapter 76.

It is also argued that the amount the stockholder actually has to pay is increased by reason of the receiver's expenses, and this point is amplified to some extent in the briefs for plaintiff in error. It is asserted that, previous to the passage of Chapter 272 of the Laws of 1899, stockholders were only liable for their proportion of the debts, and not for any additional expenses of the receivership. In this same case of Harper v. Carroll, at page 508, the court said:

> "Some of the appellants contend that while the creditors are entitled to recover the amount of their claims, with interest and statutory costs and disbursements, from the stockholders, the latter cannot be required to pay any additional amount of costs and expenses. We cannot so hold. The statute provides for the appointment of a receiver, and this implies that his expenses may be recovered in addition to the above amounts, not exceeding, of course, the amount of the statutory liability of the stockholders."

In the case of Frost v. St. Paul Banking and Investment Company, 57 Minn. 325, the opinion was written by the late Chief Justice Gilfillan, and the decree of the lower court was affirmed. This was an action for the enforcement of stockholder's liability under the General Statutes, Ch. 76; and on page 330 the opinion states the substance of the decree appealed from and which was affirmed, in the following language:

> "And such proceedings were had that the court entered a decree establishing the claims of Frost and of the other creditor; appointing the receiver; determin-

ing the liability of each of the twelve stockholders, defendants, including appellants, on unpaid subscriptions and the amount thereof, and the statutory liability of each, and the maximum amount thereof; directing the receiver to convert the property, things in action, stock, and assets of the corporation, into money, and collect the amount for unpaid subscriptions, determined to be due from each stockholder, and out of the proceeds of such sales and collections, to pay the costs and disbursements in the action, *the charges of executing the trust*, and to pay said claims, and to make report to the court, stating the amount realized and so paid by him. And if, then, there shall remain a part of the claims unpaid, it directs that each stockholder defendant pay, upon his statutory liability, such proportion of the deficit as his stock bears to the aggregate par value of all the stock of all the stockholder defendants; and it also provides for a reapportionment of the amount so to be paid if the share of one or more of the stockholders cannot be collected by reason of insolvency."

The court will see that every element that enters into the amount the stockholder has to pay, under the law of 1899, is included in the decree, under the old act, thus approved by the Supreme Court of Minnesota. The expenses of liquidating the estate, including the receiver's costs and disbursements and these amounts are paid by the stockholders upon their stock liability, as by reason of the allowance thereof the sums realized from all other assets applicable to the payment of the creditors are reduced.

In the case of Helm v. Smith-Fee Company, et al., 79 Minn. 297, the court considered the question as to whether attorneys' fees should be allowed to the creditor who prosecuted the action against the stockholders, under Ch. 76 of

the General Statutes of 1894, and whether that should be paid out of the fund collected from the stockholders. The opinion was written by the present Chief Justice. The court below denied the petition of the plaintiff for such allowance, and this order was reversed. At page 298, the court said:

> "The court made its order denying the petition, stating in a memorandum attached thereto that there was nothing in the statute warranting the allowance, and no authority to sustain such a claim. While the memorandum is no part of the order (see Kertson v. Great Nor. Express Co., 72 Minn. 378), yet it would seem, from the whole record, that the trial court must have denied the petition as a matter of strict legal right, and not as a matter of discretion. However this may be, we are of the opinion that, in the exercise of a sound discretion, the trial court ought to have allowed the petitioner a reasonable amount for his services. The power to make such an allowance does not depend upon any statute, but upon the equity rule that, where one of many parties having a common interest in a trust fund, at his own expense takes proper proceedings to collect it for the benefit of all interested in it, he is equitably entitled to reimbursement for his reasonable expenses in the proceedings, out of the fund before its division. Now, no one creditor is entitled to enforce the liability of stockholders of a corporation for his own exclusive benefit. He must prosecute the action for the benefit of all creditors who elect to become parties to the action and exhibit their claims, and, where he assumes the burden of successfully prosecuting the action for the benefit of all, equity requires that he be reimbursed for his outlay from the common fund secured by his efforts."

In that case the full constitutional liability was enforced.

So there is nothing novel in the provision that the court, in fixing the amount of the assessment, shall take into consideration the expenses. That has always been the law, as was well known by the Supreme Court of Minnesota when it held that the liability of the stockholder was not increased by the law in question. The whole argument of the plaintiff in error upon this subject is based upon a false premise. The cases cited are those arising under entirely different constitutional or statutory provisions, as we will hereafter show.

This is not the first instance in which the legislature of Minnesota have vested in a receiver the right to maintain an action for the enforcement of the liability of stockholders. By Chapter 145 of the Laws of 1895—a statute relating to banking corporations—the appointment of receivers was authorized, and there was vested in such receiver the right to enforce the liability of stockholders. See Ueland v. Haugan, 70 Minn. 349; Anderson v. Seymour, 70 Minn. 358. Prior to the passage of Chapter 145 of the Laws of 1895, the liability of stockholders in banks had been enforced under Chapter 76, in the same manner as in the case of all other corporations. Harper v. Carroll, supra, involved the liability of stockholders in a bank. In Anderson v. Seymour, at page 377, the court says:

> "We are quite well satisfied that, in providing for the appointment of receivers for insolvent banking corporations, and that such receivers should have the right to enforce the stockholder's liability—a right theretofore held by creditors only—it was the intention of the legislature to bestow upon receivers the primarily exclusive right to proceed. They have the right of way, so to speak; and, while it is not made their positive duty to proceed against the stockhold-

ers, the duty rests upon them under the statute, by implication at least."

It will be noticed that by the statute which is attacked here (Ch. 272 of the Laws of 1899), it is provided by section 2 that the right to petition for an assessment still remains in the creditors of the corporation, as well as in the receiver; the law simply providing that, in case the petition is filed by the creditors, notice of the same must be given to the receiver. The amount of the assessment, when levied, is required to be paid to the receiver; but the right to institute the proceedings anterior to the laying of the assessment is not taken away from the creditor.

In Mohr v. Elevator Co., 40 Minn. 343, it was held that the release filed by a creditor, in insolvency proceedings against a corporation, under a statute of Minnesota then in force, discharged his claim against the stockholders upon their stockholder's liability. Thereupon the legislature enacted the proviso above referred to, to the effect that such release should not affect the stockholder's liability. This was held constitutional as against stockholders who were such and as to debts which were incurred prior to the passage of the act. See Willis v. Mabon, 48 Minn. 140, where the court said:

> "It is claimed that the act is, as to stockholders whose liability had been already incurred, unconstitutional because impairing the obligation of contracts. We confess our inability to appreciate the force of this argument. The liability of a stockholder is fixed and measured by the constitution alone. The insolvent law neither increases nor affects that liability, but has reference solely to the remedy."

The decisions of this court, and other courts outside the State of Minnesota, in analogous cases, are in harmony with the conclusions of the Minnesota court, holding that such charge in remedy does not impair the obligation of the contract.

Hill v. Merchants Ins. Co., 134 U. S. 515.
Merchants Ins. Co. v. Hill, 86 Mo. 472.
Same case, 12 Mo. App. 148.
Waggoner v. Flack, 188 U. S. 595.
League v. Texas, 184 U. S. 156.
Campbell v. Holt, 115 U. S. 627.
Ewell v. Daggs, 108 U. S. 143-151.
Terry v. Anderson, 95 U. S. 628.
Bronson v. Kinzie, 1 Howard, 315.
City & Lake Railroad v. New Orleans, 157 U. S. 219, 225.
Oshkosh Water Works Co. v. Oshkosh, 187 U. S. 439.
Penniman's case, 103 U. S. 714.
Fourth Nat. Bank v. Francklyn, 120 U. S. 747.
Tennessee v. Sneed, 96 U. S. 69.
Commonwealth v. Cochituate Bank, 85 Mass. (3 Allen) 42.
Story v. Furman, 25 N. Y. 214.
Citizens Bank v. Deynoodt, 25 La. Ann. 628.
C. & W. I. R. Co. v. Guthrie, 192 Ill. 579.
Smith v. Bryan, 34 Ill. 364.
Sparks v. Ditch Co., 2 Idaho 1030.
Penniman's case, 11 R. I. 333.
Petterson v. Berry, 125 Fed. 902.
George v. Everhart, 57 Wis. 397.
Hirshfeld v. Bopp, 145 New York 84.
Gardenhire v. McCombs, 33 Tenn. (1 Sneed) 83.
Taylor v. Keeler, 30 Conn. 324.
Cooley on Constitutional Limitations, 6th Ed., p. 356.
Thompson on Corporations, Secs. 3036 and 3037.

In Hill v. Merchants Ins. So., supra, this court held that a state statute which conferred upon a judgment creditor of a corporation, when execution on a judgment against the corporation was returned unsatisfied, the power to summon in a stockholder who had not fully paid the subscription to his stock, and obtain judgment and execution against him for the amount so unpaid, in no way increased the liability of the stockholder to pay that amount, although, prior to that time, he could have been sued in equity in common with other similar stockholders to compel contribution for the benefit of the creditors. On page 526 of the opinion the court said:

> "His undertaking was to pay each and all of his notes on demand, and it was entirely competent for the legislature, as a regulation of the business and affairs of the company, to give its creditors a new or additional remedy by which this undertaking could be enforced in their behalf—such remedy not increasing the debtor's liability. As said by this court in Chicago Life Ins. Co. v. Needles, 113 U. S. 574, 580, the condition is implied in every grant of corporate existence that 'the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may from time to time prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the state has granted, and serve only to secure the ends for which the corporation was created. * * *
>
> "His liability to pay that amount has no such connection with the liability of other stockholders as to exempt him from a suit at law to compel him to pay the sum he agreed to pay. Hatch v. Dana, 101 U. S. 205. The statute restricts any judgment against him to the amount he originally assumed to pay. Consequently, no substantial right of his has been violated.

'Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the obligation of the contract.'"

In Bronson v. Kinzie, supra, this court said:

"Undoubtedly a state may regulate, at pleasure, the modes of proceeding in its courts, in relation to past contracts as well as future."

From Terry v. Anderson, supra, we quote:

"It is difficult to see why, if the legislature may prescribe a limitation where none existed before, it may not change one which has already been established. The parties to a contract have no more a vested interest in a particular limitation which has been fixed than they have in an unrestricted right to sue. They have no more a vested interest in the time for the commencement of an action than they have in the form of the action to be commenced; and as to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion, provided adequate means of enforcing the right remain."

In Oshkosh Water Works Co. v. Oshkosh, supra, it was said:

"It is well settled that while in a general sense the laws in force at the time a contract is made enter into its obligation, parties have no vested right in the particular remedies or modes of procedure then existing."

In Waggoner v. Flack, supra, this court sustained a law of the State of Texas relating to the remedy for nonpayment by the purchaser of state lands. It was held that it was not unconstitutional as impairing the obligation of the contract, to authorize summary forfeiture of all the

rights of a party, holding a contract from the state, in cases of default in payment of any installment due upon the purchase price of the land, although no such forfeiture was upon the statute books at the time the contract of purchase was made. This court drew a very careful distinction between that which pertained to the obligation and that which went only to the remedy; and held that the obligation was upon the purchaser of the land to pay for the same at the price fixed in the contract, and that the forfeiture for nonpayment went only to the remedy. It would seem that that case comes much nearer to changing the respective rights of the parties than does the modification of the practice to enforce stockholder's liability which is questioned here.

In City & Lake Railroad v. New Orleans, supra, this court sustained an act of the legislature of Louisiana authorizing the enforcement, by mandamus, without a jury, of contracts by corporations with municipal corporations in that state, with reference to the paving, grading and repairing of streets and highways, although the contract in question was made prior to the enactment of the law. At page 224, the court says:

> "What the act of 1888 does is to give a parish or municipal corporation an additional and more summary remedy for the enforcement of the obligation of any contract relating to the paving, repairing, reconstructing, or care of its streets, highways, bridges, culverts, levees, canals, ditches, or crossings. It does not enlarge the obligation assumed by the defaulting corporation, nor impose new burdens upon such corporation, but only enables the other party to the contract, the public, as represented by the parish or municipality, to compel the performance of that obli-

gation. Modes of procedure in the courts of a state are so far within its control that a particular remedy existing at the time of the making of a contract may be abrogated altogether without impairing the obligation of the contract if another and equally adequate remedy for the enforcement of that obligation remains or is substituted for the one taken away."

In Fourth Nat. Bank v. Francklyn, supra, this court, considering an amendment to the statutes of Rhode Island, relative to the enforcement of stockholder's liability, said, at page 755:

"This statute permits the alternative remedy by a suit in equity—whether before or only after recovering judgment against the corporation we need not now inquire—and modifies the previous statutes in no other respect than by abolishing the right to take the person of a stockholder for the debt of the corporation; by substituting for the taking of his property on attachment and execution against the corporation, a new form of remedy, by action of debt against him upon a judgment obtained against the corporation; and by authorizing him, when so sued, either in equity or at law, to make any defense that the corporation might have made. As it does not undertake to annul the liability of the stockholders for the debts of the corporation, but only modifies the form of remedy and the rules of evidence, it is not doubted that it is a constitutional exercise of the power of the legislature, even as applied to debts contracted by the corporation before its enactment."

In Tennessee v. Sneed, at page 74, we find the following language:

"If a particular form of proceeding is prohibited, and another is left or is provided, which affords an

effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired. (Citing cases.)

"The rule seems to be that in modes of proceeding and of forms to enforce the contract, the legislature has the control and may enlarge, limit, or alter them, provided that it does not deny a remedy, or so embarrass it with conditions and restrictions as seriously to impair the value of the right."

The case of Commonwealth v. Cochituate Bank, supra, is quoted from at length by the Supreme Court of Minnesota in Straw & Ellsworth v. Kilbourne. There was involved in the former case a provision of the statutes of Massachusetts, authorizing receivers of insolvent banking corporations to "levy a ratable assessment upon the stockholders, for an amount in their opinion sufficient to make up the probable deficiency" in the assets of the insolvent; which is practically similar to the provisions of the Minnesota statute under consideration, except that in Minnesota this duty is placed upon the court. We quote from that decision the same language that is quoted by the Minnesota court:

"The previous remedy was a bill in equity by the billholders, or some one of them in behalf of himself and all the billholders. The substitute, or cumulative remedy, given by St. 1860, c. 167, is a proceeding by an assessment directly made upon the stockholders by the receivers of the bank, under the approval of this court. * * * Such assessments are by the statute to be made ratably upon all of the stockholders liable therefor. * * * It will at once be perceived that no objection to a change of remedy can be successfully urged on account of its being more speedy and effectual. That objection might be urged as to

all changes in the forms of proceeding or the organization of the legal tribunals to act thereon. Every statute extending the equity powers of this court would be obnoxious to objections of this character. The objection, to be tenable, must go beyond this, and show that the statute increased the actual liabilities of the stockholders, and was something more than a change in the mode of enforcing a pre-existing liability. * * * The proceedings under the late statute may require the action of the court upon an estimated value of such assets, rather than an absolute ascertainment of the amount; but the principle to be applied is the same, varying only in the mode of arriving at the result as to the deficiency chargeable upon the stockholders."

It would be hard to imagine an authority more direct, as the change of remedy was substantially the same in Massachusetts as in Minnesota.

In Story v. Furman, supra, the Court of Appeals of the State of New York sustained a change in the remedy for the enforcement of stockholder's liability which transferred, from the creditors themselves, to trustees for them, the right of action, and directed the trustees to resort to the assets of the corporation as the primary fund instead of to the personal responsibility of the stockholders. At page 223 the opinion of the court proceeds as follows:

"The obligation of the contract consists in the agreement or duty of the stockholder, under this act, to pay to the creditors of the corporation, upon its dissolution, an amount sufficient to pay its debts, to the extent of the respective shares of each stockholder in the said company.

"This is the contract of the stockholders, and this is its obligation.

"This statute does not in any way take away, or release, or discharge, their liability. It in no way acts upon the contract itself. It does not profess or propose to do so. On the contrary, it clearly recognizes the binding force of the statute liability. It treats it as a subsisting and valid obligation. * * *

"The objections to this act under this head are, first, that it takes from the creditor the cause of action against the stockholders which the statute of 1811 gave him, and transfers it to a trustee under different circumstances from those under which the Court of Chancery would previously have interfered with his enforcing it. And, second, because the statutory trustee is first directed to resort to another fund as the primary fund for the collection of the demand, and to suspend the collection from the stockholder until the primary fund is exhausted."

Then, after citing the previous remedy by bill in equity for the creation of a fund, to be distributed among the creditors upon ratable principles, and calling attention to the fact that under the old law the stockholder's liability could not be enforced until it was proved that a dissolution of the corporation, either by insolvency or otherwise, had taken place, and that under the new law the trustees were permitted by resolution to declare the fact of insolvency, the opinion proceeds, at page 225:

"Without this act, the corporation could not be dissolved *ad invitum*, in favor of creditors, till its property and assets were all disposed of. It could not be held to be dissolved until its property was exhausted. The provisions of this act of 1852 expedite the dissolution, the closing up of the affairs of the corporation, and give the remedy against the stockholders, before given in equity.

"I cannot see, therefore, how this act in any essential particular affects the remedy injuriously to the creditor. But, if it does affect such remedy, it clearly does not go beyond the scope or degree of such variation of it as is clearly within the rules of allowable alterations of state laws, as the same is stated by Judge Taney in the quotation from his opinion in Remsen (Bronson) v. Kinzie, above given, and also as asserted in the Planters' Bank v. Sharp, 6 How. 330, and in Crawford v. The Branch Bank, 7 id. 282. The act of April 16, 1852, I consider, therefore, entirely constitutional and valid."

In Ewell v. Daggs, supra, this court was considering the effect of the repeal of the usury statute of the state of Texas upon debts contracted in violation of the statute prior to the repeal. It was held that the lender was entitled to recover, as the defense of usury pertained only to the remedy. At page 151 the court said:

"Independent of the nature of the forfeiture as a penalty, which is taken away by the repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri* and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which, contrary, to law, he actually made, is just ground for imposing upon him, by subsequent legislation the liability which he intended to incur. That principle has been re-

peatedly announced and acted upon by this court.
* * *

> The right which the curative or repealing act takes away in such a case is the right in the party to avoid his contract, a naked legal right which it is usually unjust to insist upon, and which no constitutional provision was ever designed to protect. Cooley Constitutional Limitations, 378, and cases cited."

This case is peculiarly apt as an answer to the argument of the counsel for the plaintiff in error at pages 18 and 54 of his brief, that Chapter 272 of the Laws of 1899, is unconstitutional for the reason that, prior to the enactment of this law, the constitutional liability of a stockholder could not be enforced unless the stockholder chose to go into the state of Minnesota; that is to say: he admits that the stockholder by acquiring his stock agreed to become liable, and by appearing upon the stock books of the corporation induced creditors to trust the corporation upon the faith of his stockholders' liability, knowing all the time, however, that if he could get over the state line of Minnesota into another state, he would have reached a house of refuge, and the creditors of the corporation would be unable to collect their just claims. The vast majority of the stock of the corporation might be owned in states other than Minnesota. This ownership would, of course, involve the control of the corporation; for many years dividends might flow from Minnesota to these other states and be received by the stockholders, but when misfortune happened to come to the company the creditors who had no interest in the success of the corporation except to recover their just debts for moneys loaned and property advanced to the corporation to enable it to earn the dividends

it had paid, were remediless, and when an attempt is made to cure this injustice and compel these people to pay their honest debts and to fulfill the obligation they assumed when their stock was acquired, they have the temerity to come into court and say that this new remedial statute impairs the obligation of their contract by rendering them no longer immune from the payment of their debts. This court in Campbell v. Holt, supra, at page 627, has disposed of this unconscionable argument of the plaintiff in error, as follows:

> "There are numerous cases where a contract incapable of enforcement for want of a remedy or because there is some obstruction to the remedy can be so aided by legislation as to become the proper ground of a valid action. * * *
>
> In all this class of cases the ground taken is that there exists a contract, but by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy, been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract otherwise unobjectionable."

And further on in the opinion, in answering the suggestion that the legislation there under consideration, which was the repeal of a statute of limitation on actions on personal debts, infringed vested rights, this court well said at page 628:

> "We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right so as to be beyond legislative power in a proper case."

And again on page 629:

> "We can understand a right to enforce the payment of a lawful debt. The constitution says that no state shall pass any law impairing this obliga n, but we do not understand the right to satisfy that obligation by a protracted failure to pay. We can see no right which the promisor has in the law which permits him to plead lapse of time instead of payment, which shall prevent the legislature from repealing that law because its effect is to make him fulfill his honest obligations."

Thus the court draws a distinction between a law impairing the obligation of a contract, and a law which aids in the enforcement of that obligation. The latter is not, and cannot be within the constitutional prohibition. Judge Cooley, in his work on Constitutional Limitations, 6th Edition, page 356, thus states the rule:

> "It is also equally true that where a legal impediment exists to the enforcement of a contract which parties have entered into, the constitutional provision in question will not preclude the legislature from removing such impediment and validating the contract. A statute of that description would not impair the obligation of contracts, but would perfect and enforce it."

The expenses of liquidation including Receiver's fees, attorney's charges and all other necessary disbursements are clearly in the nature of costs, and costs and disbursements of litigation may be increased or diminished or changed in any way at the pleasure of the legislature, without impairing the obligation of contracts made prior thereto. This has been distinctly held by many courts.

In George v. Eberhart, supra, the Supreme Court of Wisconsin sustained a statute which removed a limitation as to the amount of costs that might be collected, which was enacted during the pendency of the suit. That is a substantial matter in Wisconsin, as they have in that state a fee bill under which the prevailing party is allowed attorneys' fees and various other disbursements.

In Gardenhire v. McCombs, supra, the Supreme Court of Tennessee held that an act of the legislature passed pending the suit, which repealed a previous statute providing by the first section: "The plaintiff shall in no instance recover of the defendant a greater sum in costs than may be assessed by the jury in damages," and which substituted therefor the provision: "In all suits for the recovery of damages occasioned by the overflowing of water, the successful party shall be entitled to full costs," did not in any way impair the obligation of a contract. The court said:

> "It has been long settled in this state, and was reaffirmed at the last term of this court at Nashville, that a retrospective law, in the proper meaning of our constitution, is a law impairing the obligation of a contract, or disturbing vested rights. This doctrine is understood to have no application to laws which merely regulate the remedy or mode of procedure, as contra-distinguished from the right; and of this character is the act of 1852."

In Hirshfeld v. Bopp, supra, the Court of Appeals of New York sustained a law which gave the prevailing party, under a new procedure, costs and disbursements which were not provided for under the old law in force at the time the action was begun.

Reference is made several times in the briefs of

plaintiff in error, to a suit brought by the defendant in error against one Stewart, in the Supreme Court of the state of New York, in which the appellate division held that the defendant in error could not recover. We will discuss that case hereafter, but in this connection we call attention to the fact that the case was tried before the Hon. William G. Choate, formerly United States District Judge, as Referee; that he found all of the issues in favor of the receiver, and wrote an elaborate opinion, which was filed with the Clerk of the Supreme Court in New York, but which, unfortunately, we are unable to refer to in the reports. We will, however, take the liberty of attaching to this brief a copy of Judge Choate's opinion. The suggestion was made in argument before him, that receiver's expenses should not be allowed as against the stockholders. Answering that objection, Judge Choate said:

> "I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs, are in the nature of costs, and primarily an obligation of the corporation itself, for which the stockholder is bound under the constitution. The appointment of a receiver for the purpose of liquidating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end, and ordinarily, the fees and expenses of the receiver are paid out of the assets of the insolvent estate (See Harper v. Carroll, 66 Minn. 437); and the court appointing the receiver is the proper court, indeed, properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these expenses are a mere incident of the receivership and of the remedy prescribed by the legislature of Minnesota."

In the case of League v. Texas, supra, this court had before it the tax law of the state of Texas, which, by an amendment passed after taxes had become delinquent, adopted a new remedy for their collection. At page 158, the court said:

> "That a state may adopt new remedies for the collection of taxes and apply those remedies to taxes already delinquent, without any violation of the federal constitution, is not a matter of doubt. A delinquent tax payer has no vested right in an existing mode of collecting taxes. There is no contract between him and the state that the latter shall not vary the mode of collection. Indeed, generally speaking, a party has no vested right in a mere matter of remedy that is subject to legislative change."

It was suggested in that case that interest, and expenses, including attorneys' fees and costs, were included in the new remedy by judicial proceedings which were not provided for by the prior statutes in reference to collectors' sales, but the court held that that did not invalidate the law as impairing the obligation of a contract.

The local stockholders whose assessment is reduced by reason of the ability of the receiver under the present law to collect from non-residents are not concerned about receiver's expenses, but this argument comes from stockholders residing outside the state of Minnesota who object to paying not only costs and expenses but their honest debts due to creditors who have loaned money to this corporation on the faith of the stockholders' liability.

None of the authorities cited in subdivision 6 of the brief of plaintiff in error at page 14, in any way support the proposition for which they are cited in this case.

Barnitz v. Beverly, 163 U. S. 118, merely held that a statute which authorized the redemption of property sold upon foreclosure of a mortgage, where no right of redemption previously existed, or which extends the period of redemption beyond the time formerly allowed, cannot constitutionally apply to a sale under a mortgage executed before its passage.

Webster v. Bowers, 104 Federal Rep. 627, held that a statute in New Jersey which deprived a creditor of the right to sue a stockholder of a Kansas corporation, was void. It will be recalled that until the passage of the Kansas act of 1899, which is referred to by this court in Evans v. Nellis, 187 U. S. 271, the remedy of a creditor against the stockholder of Kansas corporations, consisted in an action at law, which might be brought in any place by the creditor where he could find the stockholder.

See Whitman v. Oxford Nat'l. Bank, 176 U. S. 559.

As we have heretofore pointed out, the Supreme Court of Kansas held the constitutional provision imposing the liability of stockholders was not self-executing, but required legislation so that not only was the remedy created by the statute, but the right also. But there was no provision in Kansas by which a creditor was obliged to sue on behalf of himself and all other creditors who might join, as has been the case in Minnesota. Beginning with the case of Allen v. Walsh, in 25 Minnesota, which we have heretofore cited, it has always been the settled law in Minnesota that the liability is to all the creditors in common. No creditor had the right to sue a stockholder in an action

at law and recover the whole of his claim, while other creditors received nothing.

Bank v. Loan Co., 61 Minn. 375.

Richardson v. Merritt, 74 Minn. 354.

That has at all times, up to 1899, been the distinction between the rule in Kansas and the one in Minnesota.

It was held by Judge Gray in the Western Nat'l. Bank v. Reckless, that the New Jersey act which forbade the maintenance of an action at law in behalf of an individual creditor against an individual stockholder, but apparently sanctioned a proceeding in the nature of an accounting in equity in which all the creditors of the foreign corporation and all its stockholders should be necessary parties, did much more than change the form of the remedy; it also destroyed the substantial right of action which the plaintiff had theretofore had, and he quotes from Judge Lowell in Dexter v. Edmands, 89 Federal, 469, as follows:

> "The difference between a right vested in all the creditors to proceed in one action against all the stockholders, and a right vested in each individual creditor to proceed against any individual stockholder, is much more than a difference between two remedies; it is a difference between two substantive rights."

Chapter 272 of the Laws of Minnesota in no way changes the relative rights of the creditors and stockholders. The fund created by the assessment of the stockholders under the new law is distributed among all the creditors in proportion to the amounts of their demands, the same as under the old practice. No individual right of action against an individual stockholder is taken away for the reason that no such right previously existed. Exactly the same considerations render the case of Evans v. Nellis, 101 Fed-

eral, 920, entirely inapplicable to the questions under discussion here. In that case Judge Cox merely held, as did Judge Gray, in effect, that the law of Kansas passed also in 1899, which provided for a suit by a receiver, and a distribution of the proceeds among all creditors and which took away the right of the individual creditor to sue the individual stockholder which he had at the time the obligation sued upon was created, impaired the obligation of the contract, for the reason that instead of the diligent creditor having an opportunity to make his claim in full by suing an individual stockholder, he was compelled to accept such dividend as the sum arising from the assessment of all the stockholders might pay to all the creditors. We make no comment upon the correctness of the conclusions of these courts, but merely discuss the cases to show that they have no bearing upon the situation presented in this controversy.

The same question was involved in Knickerbocker v. Meyers, 139 Federal, page 111, where the court had under consideration a similar change in the law of the state of Maryland, and it was held, disagreeing with the courts of the state of Maryland (see Miners & Merchants' Bank of Lonconing v. Snyder, 59 Atlantic Reporter 707), that depriving the individual creditor of the right to proceed against the individual stockholder took away a substantive right, and therefore impaired the obligation of the contract.

The case of Grand Rapids Savings Bank v. Warren, 52 Michigan, 557, cited by counsel, simply held a law invalid which took away absolutely all remedy against the estate of a deceased stockholder, whereas, under the legislation in force at the time the debt was created, the estate was liable.

(b) THE LEGISLATION IN QUESTION DOES NOT TAKE THE PROPERTY OF THE STOCKHOLDER WITHOUT DUE PROCESS OF LAW.

The provision of Sec. 5, Chapter 272 of the Laws of 1899, which reads as follows: "Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing, or having notice thereof or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment," is constitutional legislation, for the reason that all stockholders are represented in the said proceedings through the corporation. This proposition is thoroughly established.

Kennedy v. Gibson, 8 Wallace, 498.
Sanger v. Upton, 91 U. S. 56.
Casey v. Galli, 94 U. S. 673.
United States v. Knox, 102 U. S. 422.
Bowden v. Johnson, 107 U. S. 251.
Richmond v. Irons, 121 U. S. 27.
Hawkins v. Glenn, 131 U. S. 319.
Glenn v. Liggett, 135 U. S. 533.
Great Western Tel. Co. v. Purdy, 162 U. S. 329.
Hancock National Bank v. Farnum, 176 U. S. 640.
Straw & Ellsworth Co. v. Kilbourne Co., 80 Minn. 125.
London & N. W. Mortgage Co. v. St. Paul Park Co., 84 Minn. 144.
Marson v. Deither, 49 Minn. 423.
In re Minnehaha Driving Park Assn., 53 Minn. 423.
Holland v. Duluth Co., 65 Minn. 324.

Oswald v. Minneapolis Times Co., 65 Minn. 249.
Langworthy v. Garding, 74 Minn. 325.
Howarth v. Lombard, 175 Mass. 570.
Howarth v. Ellwanger, 86 Fed. 54.
Glenn v. Williams, 60 Md. 93.
Vanderwerken v. Glenn, 85 Va. 9.
Howard v. Glenn, 85 Ga. 238.
Mutual v. Phoenix, 108 Mich. 170.
Parker v. Stoughton, 91 Wis. 174.
Sheafe v. Larimer, 79 Fed. 922.

This question was, of course, directly involved in the consideration of the petition for *certiorari* in Burget v. Robinson, which we have heretofore discussed, and authorities bearing upon the question were cited to the court in the briefs of counsel.

The rule is fully laid down by this court in Hancock National Bank v. Farnum, supra, at pages 643 and 644:

> "What then is the faith and credit given by law or usage in the courts of Kansas to a judgment against a corporation? What is the effect of such a judgment as there established? This is a question not answered by referring to general principles of law, by determining what at common law was the significance and effect of a judgment, but can be answered only by an examination of the decisions of the courts of Kansas. The law and usage in Kansas, prescribed by its legislature and enforced in its courts, make such a judgment not only conclusive as to the liability of a corporation, but also an adjudication binding each stockholder therein. We do not mean that it is conclusive as against any individual sued as a stockholder that he is one, or if one, that he has not already discharged by payment to some other creditor of the corporation

the full measure of his liability, or that he has not claims against the corporation, or judgments against it, which he may, in law or equity, as any debtor, whether by judgment or otherwise, set off against a claim or judgment, but in other respects it is an adjudication binding him. He is so far a part of the corporation that he is represented by it in the action against it. (Ball v. Reese, 58 Kansas 614.) In that case it was said, correcting an inference which was sought to be drawn from language in the case of Howell v. Manglesdorf, 33 Kansas, 194, in respect to the effect of a judgment against a corporation (pp. 617, 618): 'The general holding of this court has been that a judgment is final and conclusive between the parties and their privies; and we think it must be held that every stockholder in a corporation is so far privy in interest in an action against the corporation that he is bound by the judgment against it. In the absence of fraud and collusion, the judgment must be held to be final and conclusive against the stockholder if the court rendering it has final jurisdiction. As the judgment was valid, the court committed error in allowing the defendant to go behind it and contest matters which were conclusively settled by the judgment against the corporation.' This representative character of the corporation has been affirmed by this court in several cases.

In Hawkins v. Glenn, 131 U. S. 319, it was held that 'in the absence of fraud, stockholders are bound by a decree against their corporation in respect to corporate matters, and such a decree is not open to collateral attack.' This was a case in which an assessment ordered by a court which had jurisdiction of the corporation was held binding upon stockholders residing in another state; and in the opinion, on page 329, it was said by Chief Justice Fuller: 'A stockholder is so far an integral part of the corporation that in the view

of the law, he is privy to the proceedings touching the body of which he is a member.' See also Glenn v. Liggett, 135 U. S. 533; Great Western Tel. Co. v. Purdy, 162 U. S. 329, 337.

Now, as the judgment rendered in the Kansas Court is in that state not only conclusive against the corporation but also binding upon the stockholder, it must, in order to have the same force and effect in other states of the union, be adjudged in their courts to be binding upon him, and the only defenses which he can make against it are those which he could make in the courts of Kansas. The question to be determined in this case was not what credit and effect are given in an action against a stockholder in the courts of Rhode Island to a judgment in those courts against the corporation of which he is a stockholder, but what credit and effect are given in the courts of Kansas in a like action to a similar judgment there rendered. Thus and thus only can the full faith and credit prescribed by the constitution of the United States and the act of Congress be secured."

In view of this decision it would seem that the important question for consideration is, what effect do the courts of Minnesota give to an assessment levied in the absence of the stockholder in a proceeding to which the corporation itself is a party? In that state the decree of the court levying such assessment is conclusive upon the stockholder whether present, or represented, or not.

In Straw & Ellsworth Manufacturing Co. v. L. D. Kilbourne Boot & Shoe Co., 80 Minn. 125, which, as we have heretofore said, was the first case arising in the State of Minnesota involving the constitutionality of the legislation in question, that court cited Hancock National Bank v. Far-

num, among other cases, in support of the constitutionality of the act. At page 136 of the opinion, the Minnesota Court uses this language:

> "But, as we have heretofore intimated, the stockholders are not concluded in all respects by the determination of the court, nor is that the fair meaning of chapter 272, §5. A person sued as a shareholder may show, if he can, that he is not a shareholder at all, or that he is not the holder of so large an amount of stock as is alleged, or that he has discharged his liability, or that he has a claim against the corporation which he may, in law or equity, set off against the claim or judgment in assessment, or he may make any other defense which is personal to himself. The order of assessment is, under section 5, conclusive upon all of the stockholders, so far as it decides the amount of assets and liabilities of the corporation before the court, and is conclusive as to the necessity of making an assessment to the extent and in the amount ordered. All of the cases last cited sustain the proposition that as a member of the insolvent corporation the shareholder is bound by the decision of the court of the state where it was organized, made in administering upon its affairs in an insolvency proceeding, and when determining the amount of its assets and liabilities and the amount of the assessment to be made upon the stockholders, and that collection of the amount can be enforced whenever such stockholder is found."

It will be observed that the limitations upon the power of the corporation to represent the stockholder are thus, by the Minnesota court, declared in very much the same language used by this court in Hancock National Bank v. Farnum. We quote further from the opinion of the Minnesota court, commencing at page 133:

> "The proceeding is not materially different from

that authorized by the national banking act, except that under the latter the assessment is made by the comptroller of currency, while here the assessment is by the court in insolvency proceedings. Chapter 272 is really a supplementary practice act, formulated after the practice followed in this state for the collection of unpaid stock subscriptions when insolvency has ensued. See In re Minnehaha D. P. Assn., 53 Minn. 423, 55 N. W. 598.

The absolute necessity of an adequate and speedy method for the ascertainment and collection of a sum sufficient to meet and liquidate any deficiency in corporate assets is commented upon in Kennedy v. Gibson, 8 Wall. 498, and is quite apparent. That was a case in which was decided the right of the comptroller to proceed at will as against all shareholders in a national banking association, and by an ex parte proceeding, no notice of any description being required, to determine the amount necessary to be assessed; his decision, not only as to necessity, but as to the amount of the assessment, to be incontrovertible. The doctrine of this case has been affirmed several times in the supreme court of the United States in like cases, and it has been applied in cases involving assessments made by the courts upon stockholders on account of unpaid subscriptions for stock shares. Among the latter we find Sanger v. Upton, 91 U. S. 56; Hawkins v. Glenn, 131 U. S. 319, 9 Sup. Ct. 739; and Great Western Tel. Co. v. Purdy, 162 U. S. 329, 16 Sup. Ct. 810. See also Marson v. Deither, 49 Minn. 423, 52 N. W. 38. And in Langworthy v. Garding, 74 Minn. 325, 77 N. W. 207 (one of the Mutual Insurance cases), an action at law in this state by the receiver of an insolvent mutual insurance company to recover upon an order or decree of an Illinois court, made in the course of a proceeding to wind up the corporation, directing an assessment of a specified percentage of the amount unpaid on its pre-

mium notes, this court (at page 331) used language found in the federal cases, saying:

"It appears that the court making the decree had jurisdiction of the subject-matter and of the corporation, and did therein and thereby levy an assessment of 65 per cent on all policy holders whose notes remained unpaid, and among them this defendant. He was a member of the corporation, and was so far an integral part of it that, in view of the law, he was privy to the proceedings touching the corporation of which he was such member.

"It was no more essential that all of the members should have been brought into the proceedings when the order of assessment was made than it was when the decree declaring the company insolvent and appointing a receiver was entered. The members of such corporations, like the shareholders in stock corporations, are parties to the proceedings through representation by the corporation itself. The assessment was, * * * until directly attacked and set aside by appropriate judicial proceedings, conclusive evidence of the necessity for making such an assessment, and to that extent bound each of the members without personal notice to him."

And this court is not alone in the application of this doctrine in actions brought by receivers to recover on premium notes given to mutual insurance companies. See Parker v. Stoughton, 91 Wis. 174, 64 N. W. 751; Mutual v. Phoenix, 108 Mich. 170, 66 N. W. 1095, found with an instructive note in 34 L. R. A. 694; also Warner v. Delbridge, 110 Mich. 590, 68 N. W. 283.

There can be no difference, in principle, in respect to the question now under consideration, between an action to recover on premium notes, when insolvency of the company has made an assessment on the members necessary, and an action to enforce a stockholder's liability, constitutional or statutory; and it has al-

ready been said by this court in Hanson v. Davison, 73 Minn. 454, 462, 76 N. W. 254, an action of the nature last mentioned, that 'in principle, there can be no difference in this respect between an action to enforce an unpaid subscription and one to enforce a stockholder's liability.' Incidentally the question was referred to in Holland v. Duluth Iron M. & D. Co., 65 Minn. 324, 68 N. W. 50.

If, construing the law of 1899 as we do, the question has not heretofore been settled by this court, there is an abundance of authorities elsewhere upon the exact point. The rule is laid down in 3 Thompson, Corp. §3499, and it has been elaborated in the very recent case of Howarth v. Lombard, 175 Mass. 570, 56 N. E. 888. This was an action (in which the insolvency proceedings against a domestic corporation were had in the state of Washington) brought by the receiver, appointed in Washington, against a stockholder residing in Massachusetts, to enforce the double liability. Said the court:

"It is plain that no action can be maintained against a stockholder until after proceedings in a court of Washington, showing the insolvency of the corporation, and the need of payment to satisfy the claims of creditors. After such proceedings, and an adjustment of the rights and liabilities of the corporation, of creditors, and of stockholders, collection can be made from stockholders wherever they are found."

Then, stating what had been judicially determined in Washington as to the necessity of an assessment and the amount thereof, the court continued: 'The court of Washington, acting under its general authority in such administration, is the only tribunal which has jurisdiction to determine the amounts due creditors, and to collect and apply the assets of the corporation. The undertaking of the stockholders relates directly to the payment of amounts so to be ascertained. The

ascertainment is like a common case of a judgment against a corporation which is binding on stockholders. The members of such corporations, as well as the corporations themselves, are within the jurisdiction of the local court so far as is necessary for the determination of the rights and liabilities of the corporation and its members among themselves. In reference to this kind of liability such decisions and orders are binding on stockholders who are not before the court otherwise than by virtue of their membership in the corporation,'—citing a large number of cases, some of which we have hereinbefore referred to, including Marson v. Deither, supra.

And further: "We can see no difference in principle between the secondary liability and the primary liability referred to in the' opinion in Wilson v. Book, 13 Wash. 676. 'Each grows out of the same statute and the same undertaking. Each is founded on an implied promise made in pursuance of the requirements of the statute. In reference to each, the subscriber for stock contemplates the same kind of proceedings, and a collection by the same officer, who represents not only such assets as the corporation has for all purposes, but the right to a special fund.

To the same effect are the cases of Hamilton v. Glenn, 85 Va. 901, 9 S. E. 129; Glenn v. Williams, 60 Md. 93; Sheafe v. Larimer (C. C.), 79 Fed. 921; Howarth v. Ellwanger (C. C.), 86 Fed. 54; Howarth v. Angle, 39 App. Div. (N. Y.), 151, affirmed in court of appeals in 162 N. Y. 179, 56 N. E. 489. And, in an action on a liability identical with that which this receiver is attempting to enforce, the supreme court of the United States has very recently indorsed and applied the same doctrine. Hancock Nat. Bank v. Farnum, 176 U. S. 640, 20 Sup. Ct. 506."

It is important to notice that the supreme court of Minnesota in this case squarely decided as did the supreme judicial court of Massachusetts in the case of Howarth v. Lombard, 175 Mass. 570, that there is no difference, in principle, in respect to the question we are considering between an action to recover on premium notes when the insolvency of an insurance company has made an assessment on the members necessary or an action for unpaid installments on stock and an action to enforce a stockholder's liability, constitutional or statutory.

The primary and secondary liability of stockholders referred to in Howarth v. Lombard, in the quotation made by the supreme court of Minnesota, are terms used to designate the stockholder's superadded liability, such as is sued upon here, and the liability for unpaid assessments upon stock; the latter being referred to as a primary liability, and the former as the secondary liability. Counsel for plaintiff in error, in their briefs, seem to think there is some marked difference in principle governing the two classes of liability, and while admitting that the receiver has a right to recover the amount of any unpaid assessments to the extent that may be adjudged necessary by the court having jurisdiction of the insolvent corporation, claims that such court is without jurisdiction to conclusively settle the amount of the superadded liability that must be paid in by the stockholders for the satisfaction of the corporate debts. It will be seen that the supreme court of Minnesota agrees with the supreme judicial court of Massachusetts that there is no distinction between the rule in the two classes of cases.

In Hawkins v. Glenn, supra, Chief Justice Fuller, at page 331, quotes from the case of Hambleton v. Glenn, de-

cided by the Court of Appeals of Virginia, in which that court, in answering the claim of the stockholder that, as the corporation was dead and had assigned its property by deed of trust, it no longer represented the stockholders in proceedings against them, urging that therefore the stockholders were not represented either by the corporation or the trustees, called attention to the law of the State of Virginia which read:

> "When any corporation shall expire or be dissolved, or its corporate rights and privileges shall have ceased, all its works and property, and debts due to it, shall be subject to the payment of debts due by it, and then to distribution among the members according to their respective interests; *and such corporation may sue and be sued as before,* for the purpose of collecting debts due to it, prosecuting rights under previous contracts with it, *and enforcing its liabilities,* and distributing the proceeds of its works, property and debts among those entitled thereto."

And, as a conclusion flowing from that statute, the Chief Justice said:

> "And, as the corporation, notwithstanding it may have ceased the prosecution of the objects for which it was organized, could still proceed in the collection of debts, the enforcement of liabilities, and the application of its assets to the payment of its creditors, all corporate powers essential to these ends remain unimpaired."

The statutes of Minnesota have continuously, since the revision of 1866, contained a similar provision. It appeared first as §167 of Ch. 34 of Gen. Stat. 1866; was carried over as §416 of Ch. 34 of Gen. Stat. 1878; and now appears

as §3431 of Gen. Stat. 1894. The section reads as follows:

> "Corporations whose charters expire by their own limitation, or are annulled by forfeiture or otherwise, shall nevertheless continue bodies corporate for the term of three years after the time when they would have been so dissolved, for the purpose of prosecuting and defending actions by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business for which they were established."

This section is just as applicable to a corporation whose right to do business has been terminated by proceedings taken under Ch. 76 of the Minnesota General Statutes of 1894, as was the section of the Virginia Code to a corporation in the hands of the Richmond Chancery Court in a suit brought by a judgment creditor on behalf of himself and all other creditors who might intervene.

It appears by the statement of the case in Hawkins v. Glenn ,at page 323-325, that the proceedings against the express company, in that case, were substantially identical with the proceedings under consideration here. No notice was given, except by publication, of the hearing before the commissioners, to take an account of the debts due by the company, so that the stockholders were not present to contest the validity of the claims, except as they were before the court by representation.

We invite the attention of the court to the large number of cases decided by the courts of different states and also by the Federal Courts, involving the Glenn assessment; which cases are noted in the report of Hawkins v. Glenn, at pages 327 and 328.

In Howarth v. Ellwanger, et al., supra, the Circuit Court for the Northern District of New York sustained, as conclusive upon non-resident stockholders, the same assessment that was upheld by the Supreme Judicial Court of Massachusetts in the case of Howarth v. Lombard. We quote from the opinion:

> "Again, it is argued that the orders and decrees of the Washington court were not binding upon the defendants, and, in support of this view, various alleged defects in the proceedings are pointed out. The defendants Kent and Ellwanger were parties to the Washington action, and are therefore in no position to attack the judgment of the court in a collateral proceeding. The defendant Woodworth was not a party. But, whether parties or not, the law seems clear that the stockholders are bound by the order making the assessment. Hawkins v. Glenn, 131 U. S. 319."

The opinion also quotes from the case of Sheafe v. Larimer, supra, which was an opinion by Judge Shiras, in a suit pending in the Circuit Court for the Northern District of Iowa, upon another assessment levied by a Washington court, requiring the payment of the superadded liability of shareholders. The court held that it was not necessary to give notice to individual stockholders in order to confer jurisdiction upon the court to make the assessment order; and quoted from Hawkins v. Glenn, and also cited Glenn v. Liggett, supra, and Priest v. Glenn, 51 Fed. 400. At page 923, Judge Shiras said:

> "Under the rule as given in these cases, it must be held that the stockholders in the Washington Savings Bank are bound by the assessment order granted by the Superior Court of Kings County, and that the validity thereof cannot be questioned in this collateral proceeding, in this court, upon any of the grounds set

forth in the answer of the defendant. If it be true that no real necessity for calling upon the stockholders existed, and that the assessment was improvidently made, relief must be sought in the court granting the order. In this case it must be held that it is not open to the defendant to question the validity of the assessment order, on the ground that the stockholders were not personally notified of the application for the order, or for the reason that the stockholders should not have been assessed until the other assets of the corporation had been wholly exhausted."

There is no reason that can be suggested in principle why any distinction should be made between the binding character of an assessment for an amount unpaid upon corporate stock, and the amount assessed upon the superadded liability. They both exist for the benefit of the creditors. In Minnesota the liability to pay up for bonus stock or unpaid stock, exists only as to subsequent creditors in the absence of an express agreement between a subscriber and the corporation.

Hospes v. Northwestern Mfg. & Car Co., 48 Minn. 174.
First Nat'l. Bank v. Gustin, 42 Minn. 327.

This seems to be the rule in this court.

Coit v. Gold Amalgamating Co., 119 U. S. 343.
Handley v. Stutz, 139 U. S. 435, 436.

In the latter case, the court cited approvingly Bank v. Gustin, supra. When a member of a corporation acquires stock, he impliedly holds out to persons who may extend credit to the corporation that he will pay for his stock at par, and at the same time represents to such creditors that he will, in addition, stand as surety for the cor-

poration to such an amount as may be necessary, not exceeding the amount of his stock. When the corporation becomes insolvent, its affairs are liquidated by a court of chancery, which collects in all of the assets, which, after the payment of expenses, are distributed to the creditors. Among those assets to which the creditors have the right to look for the satisfaction of their claims, are the two classes of stockholders' obligations which we have mentioned. Therefore, it seems clear that the Supreme Judicial Court of Massachusetts was correct in saying that there is no distinction in principle as to the binding character of the assessment between the primary and secondary liability of shareholders.

THIRD, THE PLAINTIFF, HAVING BY STATUTE TITLE TO THE FUND IN QUESTION, HAS THE RIGHT TO SUE FOR IT IN ANY JURISDICTION.

This proposition is not disputed in the brief of the counsel for the plaintiff in error, as they have contented themselves with a statement in subdivision 5, page 14, that under the laws in Minnesota in force when the Thresher Company was incorporated, and the contract of subscription was made by the defendant, a receiver was not a proper party to enforce the statutory liability of stockholders; and in the brief filed by Mr. Tanzer, there is only a short reference to the question at pages 57 to 61. It certainly must be clear that this court intended to hold that a receiver under Chapter 272 of the Laws of 1899, had the right to sue, or it would not have denied the petition of Burget for a writ of certiorari in the case which we have heretofore considered at length. The main question for

determination in Hale v. Allinson, decided the same day, was as to the right of a receiver appointed under the old law, to sue outside the state, and that right was denied partially upon the authority of the Minnesota courts, which held that such receiver had no right to sue even within the State of Minnesota; but Hale had no rights whatever based upon the title conferred upon a receiver by the remedial statute passed in 1899. His authority proceeded wholly from the order of the court appointing him, and under the line of decisions that such a court officer has no powers extending beyond the jurisdiction of the court appointing him, he was by this court denied the right to sue in the Circuit Court of the state of Pennsylvania. In the opinion in Hale v. Allinson, at page 66, this court, after quoting from the decisions of the state of Minnesota, and discussing the provisions of Chapter 76, which was the only statute in force at the time, said:

> "There is no holding that the statute itself provides in terms for such an action, or empowers a receiver to maintain it, or that it transfers any title in the fund to him."

Then, after citing certain sections of the statute, the opinion proceeds:

> "The receiver, if he be appointed, is not given power to represent the creditors or to maintain, as representative owner, or trustee, an action, inside or outside the state, to enforce the liability spoken of. * * * The statute did not make this liability assets of the corporation, or confer upon any receiver appointed in the case, the right to proceed to enforce it. * * * We are of opinion, following the decisions of the highest court of Minnesota, that the statutes of that state do not provide for the appointment of a receiver to

recover as such, the amount of the added liability of the non-resident shareholders to creditors of an insolvent corporation. They do not provide that such liability shall be assets of the corporation, to be recovered by the receiver and payable to its creditors when such liability is enforced and the money recovered. * * * We are thus brought to the fact that this is a plain and simple case of the appointment, authorized by statute, of a receiver by a court of equity in the exercise of its general jurisdiction as such court, with no title to the fund in him, and where such receiver acts simply as the arm of the court without any other right or title, and the question is whether, in these circumstances, a receiver can maintain this suit in equity in a foreign state by virtue of his appointment, and the direction to sue contained in the decree in the case in which he was appointed a receiver?"

The court thus in every way emphasizes the distinction between the character of the receivership under the new law, and the rights of a simple receiver in equity who is but the arm of the court. In the same opinion, in Hale v. Allinson, at page 65, in discussing the decision in Evans v. Nellis, 187 U. S. 271, which involved a statute of Kansas passed in 1899, in its essential features like the Minnesota law of 1899, the court said:

"It was shown that the act of 1868 made the stockholder liable to the creditor, and that the receiver could not maintain the action thereunder. It also appeared that under the statute of 1899, which made the stockholder's liability an asset of the corporation, to be collected by the receiver, no such action could be maintained except by complying with the statute, and as the receiver had not done so, it was held he could not maintain the action outside the state."

It is also significant to notice that the court, at page 70, referring to the contrariety of opinion in the lower federal courts with regard to the right of a receiver situated as the complainant Hale was, to maintain an action outside the state of his appointment, cited first, Hazard v. Durant, 19 Federal, 471, a decision rendered by Judges Lowell and Nelson in the Circuit Court for the District of Massachusetts. It will be recalled, as we have heretofore shown, that in Robinson v. Brown, reported in 126 Federal, 429, Judge Lowell decided that a receiver appointed under the law of 1899, had a right to maintain an action for the collection of the stockholders' liability. In neither brief filed by or on behalf of plaintiff in error is there any explanation of the fact that this court denied certiorari to Burget to review, among other questions, the right of the receiver to sue on the same day that it handed down the opinion in Hale v. Allinson.

Even though the matter now under discussion was open and undetermined by this court, it is clear that the receiver, Converse, has title to the fund for which he sues, and that he is entitled to maintain an action for the recovery of these assessments in any jurisdiction where a stockholder may be found. He does not rest his title or claim upon the order of the court appointing him. The statute merely fixes a receiver, appointed as was Converse, as the statutory trustee of these demands. The fund does not come into existence until after his appointment, and the statute provides that the assessment shall be paid to him. The nature of a receivership, under Ch. 76, and the receiver's relation to the corporation and the creditors

thereof, has been stated by the Supreme Court of Minnesota in many cases.

Minn. Thresher Co. v. Langdon, 44 Minn. 37.

Arthur v. Willius, 44 Minn. 409.

Spooner v. Bay St. Louis Syndicate, 47 Minn. 464.

St. Louis Car Co. v. Stillwater St. Ry. Co., 53 Minn. 129.

In re People's Live Stock Ins. Co., 56 Minn. 180.

Olson v. Cook, 57 Minn. 552.

In the case of In re People's Live Stock Ins. Co., supra, the court said:

> "The proceeding, begun pursuant to 1878 G. S. Ch. 76, §9. That is primarily a proceeding to sequester the stock and assets of a corporation assumed to be insolvent because an execution against it has been returned unsatisfied, to convert the assets into money, and to pay it ratably in satisfaction of the debts. It can only be begun by a judgment creditor, whose execution has been returned unsatisfied; but, when begun, all other creditors, whether their claims are in judgment or not, may become parties to it, and share in its benefits; and §15 it may become a proceeding also to enforce the liability for any cause of the directors and stockholders, for the debts of the corporation. It then becomes a proceeding in effect to wind up the affairs of the corporation, certainly so far as its then management and ownership are concerned, as well as to enforce the claims of creditors."

In Arthur v. Willius, the court said:

> "An action against a corporation under Gen. St. 1878, Ch. 76, is in the nature of an action to wind up its affairs, to collect and convert all its assets, and appropriate them ratably among creditors, and to enforce the individual liability of stockholders and

others to the extent of the deficiency of assets. * *

The proceedings are susceptible of being moulded into almost any form necessary to accomplish their purpose of securing a full and final adjustment of the rights and liabilities of all parties growing out of the corporate business."

In St. Louis Car Co. v. Stillwater St. Ry. Co., supra, the court not only defined very well the functions of a receiver, under Ch. 76, but also conclusively answered the suggestion made in a brief of counsel that a receiver, under Ch. 76, could not be appointed where there were no tangible assets for him to receive. In that case all the property of the corporation had been mortgaged; foreclosure proceednigs had been instituted; and a receiver had been appointed in the foreclosure suit, who had taken possession of all of the assets of the corporation of every description. When an application was made for the appointment of a receiver, under Ch. 76, it was objected that such an appointment could not be made, owing to the fact that all of the property had been taken out of the hands of the corporation by the receiver in the foreclosure suit. The objection was overruled; and it was in answer to that suggestion that the court used the following language:

"On the other hand, the object of a receivership of an insolvent corporation, 1878 G. S. Ch. 76, is to sequestrate all its property for the benefit of all of its creditors * * *

He (the receiver, under Ch. 76) has substantially all the powers and functions of an assignee in bankruptcy. Everything becomes assets in his hands which are assets as to creditors, although not assets as to the corporation, as, for example, property conveyed in fraud of creditors, capital withdrawn without provision for the payment of corporate debts, *the personal liability of stockholders,*" etc. (The italics are ours.)

In Minnesota Thresher Co. v. Langdon, the Minnesota court used this language (p. 39):

> "The sequestration of the property of a corporation, by an adjudication of its insolvency, and the appointment of a receiver of its property and effects, under the provisions of Ch. 76, is in the nature of an attachment or execution in behalf of all its creditors. *The receiver has substantially the same powers and functions of an assignee in bankruptcy.* (The italics are ours.) * * *
>
> "He succeeds to the rights of the creditors as well as of the insolvent corporation. * * * Everything becomes assets in his hands, and hence in the custody of the law, which were assets as to creditors as well as what was assets as to the corporation. * * *
>
> It follows that a receiver of an insolvent corporation as the representative of its creditors can assert many claims against stockholders which the corporation itself could not have maintained. This is clearly contemplated, and even expressly provided for, in the various provisions of Ch. 76, relating to such proceedings."

In the latter case, the same Minnesota Thresher Manufacturing Company under consideration in this action was seeking, as the purchaser of all the assets of the Northwestern Manufacturing & Car Company, and also as a creditor of the Car Company, to recover from stockholders of the Car Company certain capital which had been withdrawn and refunded to the stockholders. And it was in discussing the question as to whether the Thresher Company, as a creditor, could maintain such an action, that the court used the language which we have quoted with reference to the functions of a receiver appointed under Ch. 76; and it held that the creditor could not maintain the action, but that the receiver stood for all the creditors, and

that the right to recover such funds so diverted vested in the receiver, and their rights must be worked out through him.

There is no language in Ch. 76 which in terms confers any such right upon the receiver. It is implied from the fact that the chapter provides for the sequestration of the property and effects of the corporation and the appointment of a receiver of the same. Still, the court held that the result was to transfer the title to the moneys so improperly diverted by an insolvent corporation from the creditors, to the receiver, who represented all the creditors.

In the law under consideration here, we have much more than that, in the way of direct legislation vesting the title in the receiver.

Sec. 3 of Ch. 272 of the Laws of 1899, among other things, provides that the order of assessment

> "shall direct the payment of the amount so assessed against each share of said stock, to the assignee or receiver, within such time thereafter as said court may specify in said order."

Sec. 4 provides that the order shall direct the receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor, and to prosecute actions against each and every such party failing to pay the same, wherever such party may be found, whether in the State of Minnesota or elsewhere.

Sec. 6 provides that it shall be the duty of the receiver, immediately after the expiration of the time specified in the order for the payment of the amount of the assessment by the parties liable therefor, to institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of said stock who

has failed to pay the amount so assessed, for the amount for which such party is liable. It then further provides that such actions may be maintained against each stockholder severally, in this state or any other state or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found.

From these sections of the statute it appears that it is made the duty of the receiver to prosecute actions to collect this assessment, and that it is made the duty of the court to direct the payment of assessments to the receiver. Therefore there is no other person who can collect it. So that, we have here a reciever, who is the statutory successor of the corporation, and likewise of the creditors of the corporation, basing his title upon the statute which creates him such statutory assignee of all parties, for the purpose of liquidating the affairs of the corporation, and, after paying the expenses thereof, satisfying the claims of creditors. A receiver of that character is entitled to sue in his own name in any jurisdiction to recover the stockholder's liability.

Relfe v. Rundle, 103 U. S. 222.
Hawkins v. Glenn, 131 U. S. 319.
Glenn v. Liggett, 135 U. S. 533.
Casey v. Galli, 94 U. S. 673.
Kennedy v. Gibson, 8 Wall. 506.
Great Western Telegraph Co. v. Purdy, 162 U. S. 329.
Great Western Mining & Mnfg. Co. v. Harris, 198 U. S. 561.
Minneapolis Base Ball Co. v. City Bank, 66 Minn. 441.
Anderson v. Seymour, 70 Minn. 358.
Ueland v. Haugan, 70 Minn. 349.

Howarth v. Lombard, 175 Mass. 570.
Howarth v. Angle, 162 N. Y. 179.
Stief v. Hart, 1 N. Y. 30.
Tompkins v. Blakey, 70 N. H. 584.
Childs v. Cleaves, 95 Me. 498.
Fish, receiver v. Smith, 73 Conn. 377.

A receiver under the National banking act is not expressly declared to be vested with the power of enforcing the individual liability of a stockholder. That act simply provides that the receiver "may, if necessary to pay the debts of such association, enforce the individual liability of the stockholder." And it was said by this court in Kennedy v. Gibson:

> "The receiver is the statutory assignee of the association, and is the proper party to institute all suits. * * * He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit."

In Stief v. Hart, the Court of Appeals of New York held that a statute cannot impose upon an official representative, created under its terms, an obligation or positive duty to bring an action without *ipso facto* conferring upon him whatever title may be necessary for him to maintain the action. The court there cites I Kent's Comm., 5th ed., 464, and Foliamb's case, 5 Coke, 116.

In Howarth v. Angle, the Court of Appeals, considering the powers of a receiver of the State of Washington, suing to collect a liability analogous to the one here under consideration, said:

> "While the plaintiff is called a receiver, the name does not measure his power, for he represents all the

creditors and stockholders of the insolvent corporation, and is authorized to maintain such actions as are necessary to recover the assets, among which is included the cause of action set forth in the complaint. He is not a mere custodian, but a quasi assignee. * * *

The statutory liability of the stockholder is an asset of the insolvent bank, the title to which was in said receiver as a trust fund for the purpose of satisfying the claims of creditors."

It was well said by the Massachusetts court, in Howarth v. Lombard, supra, in discussing the relation of the receiver to the stockholder's liability and his right to sue in his own name for the recovery of the same:

"He is charged with the administration of a trust fund, which does not take form nor come into actual existence until after his appointment, and he is the only person who can collect it. By virtue of his official relation to the corporation and its creditors, he is the owner of the legal title to this fund, as a trustee for the creditors. A suit could not have been brought in the name of the corporation, and he is the only person who can now, or who ever could, legally demand and collect the money."

The language of the Massachusetts court is particularly apt as applied to a receiver under the Minnesota law whose title is based upon a direct statute. The fund does not come into existence until the assessment is levied, and the receiver is the only party who has authority to sue for it or collect it.

In Relfe v. Rundle, this court sustained the right of the Superintendent of Insurance of the State of Missouri to sue outside the state, as the successor of the corporation, whenever the judgment of a court had been rendered dis-

solving such corporation, and providing for the winding up of its affairs, under section 6043 of the Revised Statutes of Missouri, which read as follows:

> "Upon the rendition of a final judgment, dissolving a company or declaring it insolvent, all the assets of such company shall vest in fee simple and absolutely in the Superintendent of the Insurance Department of this state and his successor or successors in office, who shall hold and dispose of the same for the use and benefit of the creditors and policyholders of such company and such other persons as may be interested in such assets."

It will be observed that Relfe's position is, under the statute, substantially identical with that of Converse, the receiver here. The rights of the receiver are not defined by the court. His title is imposed upon him by the statute. But, as a condition precedent to the fund taking shape and form, there must be a judgment, just as in the case of Relfe v. Rundle. The title did not vest in the Superintendent of Insurance until a final judgment had been rendered by the court, dissolving the company or declaring it insolvent.

The cases cited from New Hampshire, Maine and Connecticut are well considered cases, and are in harmony with Hawkins v. Glenn, and Glenn v. Liggett, although they go much further than those cases and much further than it is necessary to go here.

The latest expression of this court upon the subject now under discussion is the case of Great Western Mining & Mnfg. Co. v. Harris, supra. In that case the principle was recognized upon which Hill v. Allinson was decided; and the court also enforces the distinction which has always existed between the rights of a receiver who derives his

title from a statute, and a receiver who is a mere officer of the court, deriving all of his powers from the order of the court appointing him. The first paragraph of the syllabus of this case reads as follows:

> "A receiver is an officer of the court which appoints him. And, in the absence of some conveyance, or statute, vesting the property of the debtor in him, he cannot sue in courts of foreign jurisdiction upon the order of the court appointing him, to recover the property of the debtor."

This is an accurate statement of the rule as it has always existed in this court; but the case is not an authority against the right of the defendant in error, because he bases his title upon the statute which vests the fund in him. At page 574 the court calls attention to the character of the receivership in question in that case in the following language:

> "It does not appear that, by order of the court or otherwise, there has been any conveyance of the property and assets of the company to the receiver, nor has the corporation been dissolved and the receiver made its successor, entitled to its property and assets. * * *
>
> *Nor is our attention called to any statute vesting the title of the corporation in the receiver.* So far, then, as the receiver is concerned, his right to prosecute the action must depend upon his powers as such officer of the court, and the order of the court."

In the brief of the respondents in that case, the same distinction was drawn between a receiver such as is Converse, whose powers are defined by statute, and a receiver who is a mere instrument of the court which appointed him. (See page 571.)

## THIRD.

**THE ACQUISITION OF THE STOCK BY THE PLAINTIFF IN ERROR WAS NOT ULTRA VIRES AND IT IS LIABLE TO THE SAME EXTENT AS ANY OTHER STOCKHOLDER.**

The argument that the liability sought to be enforced is predicated upon an ultra vires and void act of the bank, depends for whatever force it may have, upon the facts surrounding the acquisition of the stock by the bank. These facts are very briefly set forth in the amended complaint as follows:

> "At and prior to May 10, 1884, the Northwestern Manufacturing and Car Company was a corporation engaged in the manufacturing business at Stillwater, Minnesota, and was a debtor of the said defendant for money loaned to it; that on May 10, 1884, the district court of Washington county, Minnesota, appointed a receiver for said corporation and its property; that afterwards and on or about the 26th day of November, 1884, the said defendant together with other creditors, and certain of the stockholders of said corporation organized a new corporation, the same being the said thresher company; that said thresher company exchanged its preferred stock at par for the claims of creditors of the Northwestern Manufacturing and Car Company, and exchanged its common stock for the preferred stock of said Northwestern Manufacturing and Car Company, and subsequently, on October 27, 1887; purchased at judicial sale the then remaining assets of the Northwestern Manufacturing and Car Company, paying for the same in part with the said claims so acquired by it, and that said defendant exchanged its claims against the Northwestern Manu-

facturing and Car Company for the said two hundred seventy-four shares of preferred stock in the capital stock of said thresher company, and has at all times since continued to be and now is the owner and holder of the same and of all thereof."

These are the only facts which can be considered, and it seems hardly necessary to say that the other alleged circumstances alluded to in the brief of counsel for plaintiff in error are, of course, not before the court.

The important features of the situation to be noticed are these: The bank was a creditor of the old Northwestern Manufacturing and Car Company for money loaned. That company failed, whereupon the plaintiff in error, acting with the other creditors and certain of the stockholders, organized the Thresher Company for the express purpose of taking over the assets of the old corporation at judicial sale. The new company gave its preferred stock at par for the claims of the creditors of the old company, thus preserving the same relation between the creditors as to the property that had existed during the receivership. This is how the plaintiff in error came to have the 274 shares of preferred stock of the Thresher Company which are involved in this suit. The claims thus acquired by the Thresher Company from the plaintiff in error and the other creditors of the old company, were used in part payment for the remaining assets of the old company purchased at the judicial sale.

This transaction presented none of the elements of an investment or a speculation on the part of the creditors of the old company. It was simply an attempt to realize the most that they could upon their claims by taking preferred stock in the new company organized to liquidate the busi-

ness. It was the logical and necessary outcome of a legitimate banking transaction. On demurrer, of course every intendment will be taken in favor of the pleading, and it must therefore be presumed that the plaintiff in error in exchanging its claims for preferred stock of the Thresher Company did so in perfect good faith, and in the honest belief that such a course of action would result in making good, or at least reducing, the amount which it stood to lose by reason of its previous banking relations with the old company.

If the stock taken by the plaintiff in error for its claim had been ordinary railroad stock or bank stock, there would be no doubt whatever of the power of the bank to take it. The mere fact that the stock that was taken happened to be stock of the corporation which took over all of the assets of the debtor, furnishes no ground for a distinction unless it be in favor of the legality of the transaction. The real test to be applied in a case of this sort is this: Was the stock taken in a bona fide endeavor to realize upon the bank's claim? If it was, then the bank's power to take the stock cannot be disputed. It is difficult to see how there can be any doubt upon the subject. The facts set out in the complaint contained no suggestion of an intention on the part of the plaintiff in error at the time of the taking of the stock to speculate or to make an investment as such. There is every indication to the contrary. In the course of its ordinary business as a banking institution, the plaintiff in error had become a creditor of a company which failed and was unable to meet all of its obligations. It must be presumed that under these conditions the bank, in uniting with the other creditors and liquidating the assets through a new company, and taking preferred stock in the new

company to the amount of its claim, was actuated by an honest motive to recover the amount which it had loaned. The 274 shares of stock in the Thresher Company, which the bank acquired, represented its claim as surely as if the stock had been stock of the company to which the money had been loaned or stock of an outside concern.

The decisions of this court settle the question beyond all controversy. In First National Bank v. National Exchange Bank, 92 U. S. 122, the facts were as follows: One Bayne, without authority, transferred to the defendant as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterwards collected the money due upon the certificate from the plaintiff, without disclosing the transfer. In the course of negotiations between the plaintiff and the defendant for the surrender of the certificate, the plaintiff offered to pay $5,000. This the defendant refused, but offered to take $20,000, and threatened suit unless settlement was made on that basis. It was eventually agreed that the plaintiff should take 400 shares of the Washington, Alexandria & Georgetown Railroad stock, the same being valued at $40,000, and 125 shares of the stock of the plaintiff, valued at $15,000, the latter to be taken in the name of one of the plaintiff's officers. Upon payment to the defendant of the total sum of $55,000, the defendant agreed to transfer to the plaintiff the certificate of deposit, together with the stock in question. In an action subsequently brought, by the plaintiff against the defendant to recover part of the money paid, the question of the power of the plaintiff to purchase the stock was raised. Chief Justice Waite stated the issue before the court, as follows:

"The question presented for our consideration in

this case is, whether a national bank, organized under the National Banking Act, may, in a fair and bona fide compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished."

The question thus presented was answered by this court in the affirmative. The court said:

"In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. * * *

It is difficult to see how a debt due from, or a contested obligation resting upon, a bank, occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business. * * *

The transaction, for all the purposes of this suit must be taken to have been, in fact, what it purports to be,—a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank."

The case just cited goes very much farther than is necessary to support the proposition which we contend for in

this case. It will be noticed that there a national bank was held to be justified in paying out a sum several times what would have been necessary to settle the claim against it for the purchase of railroad and other stocks in an endeavor to avert an impending loss. The claim against the bank did not even grow directly out of an ordinary banking transaction. The certificate of deposit in question was originally given in a deal looking to the increase of the bank's own capital. Moreover, the amount called for by the certificate had been paid in full to the party to whom it was issued. Nevertheless, in order to get rid of the extremely doubtful claim made by the other bank with which the certificate had been hypothecated, it was held proper for the bank to purchase these stocks outright for a sum nearly three times the entire amount of the claim, it being believed by the bank's officers that the stocks would rise in value and let the bank out whole. As the court says, there can be no difference, so far as the power of adjustment and compromise is concerned, between the case where the debt is due from, and the case where a contested obligation rests upon, a bank. The decision emphasizes in a striking manner the principle that any reasonable course which a bank may take to avert loss upon either a debit or a credit item growing out of a legitimate banking transaction, will be deemed to be within its powers. If a bank may expend $55,000 in the purchase of stock in order to get rid of a claim against it to the amount of $20,000, it would seem *a fortiori* reasonable and proper for a bank to take preferred stock in a reorganized company in a bona fide endeavor to recover money loaned. In both cases the act flowed naturally and logically from a legitimate banking transaction. In accepting the preferred stock of the Thresher Company in exchange for its claim, this bank did

only what any man's business instincts would have prompted him to do under like circumstances.

In National Bank v. Case, 99 U. S. 628, it was held that the plea of *ultra vires* could not be availed of in a suit to enforce stockholder's liability by a national bank which had taken the stock of another national bank as collateral security for a loan. The bank having legally acquired the stock was held liable the same as any other stockholder.

The decision in California Bank v. Kennedy, 167 U. S. 362, has been cited by counsel for the plaintiff in error to show that the plea of *ultra vires* may be set up in this suit. The California Bank case is not only palpably distinguishable from the case now under consideration, but, so far as it goes, affirms the position taken by us. The California National Bank was the defendant, in a suit brought to enforce stockholder's liability upon certain shares of stock of the California Savings Bank. The evidence showed that the national bank had owned and held the stock of the savings bank from the organization of the latter. The stock was not taken in any sense as security for a loan, or in the course of any banking transaction. It was an investment pure and simple on the part of the national bank. There were two questions raised and discussed: first, whether the statutes of the United States relating to the organization and powers of national banks, prohibited them from purchasing or subscribing to the stock of other corporations; and, second, whether, in the absence of such power, a national bank may urge its want of authority in defense of a suit to enforce its liability as a stockholder. In answering the first question in the affirmative, the court took occasion to point out the distinction between purchas-

ing and dealing in stocks outright, and accepting them in good faith as security for a previous indebtedness, citing First Nat. Bank v. Nat. Exchange Bank, supra, and Nat. Bank v. Case, supra. The court noted, in this connection, that upon the trial it was admitted that the stock of the savings bank was not "taken as security or anything of the kind," and that the transaction by which this stock was placed in the name of the national bank was one not in the course of the business of banking for which the bank was organized. Upon the second branch of the case, the court held that the plea of *ultra vires* might be set up, notwithstanding the fact that dividends had been received upon the stock by the bank. The fact that under some circumstances the bank might legally have acquired the stock, did not estop it from setting up the illegality of the transaction. This case emphasizes again the principle that the crucial test in all such cases lies in the answer to the question. How and for what purpose the stock was originally acquired? If acquired by way of pure investment or speculation, the act on the part of the national bank, so acquiring stock, is wholly illegal, and the defense of *ultra vires* is always open. If acquired in the reasonable and proper exercise of its functions as a bank, the stock is taken with all of the benefits and liabilities attaching thereto.

Concord First Nat. Bank v. Hawkins, 174 U. S. 364, is another case of an investment by a national bank in stock of another corporation. The only possible distinction between the California Bank case and this case, was, as pointed out by this court, that in the former the question considered was the liability of a national bank as a stockholder in a state savings bank, while the question in the latter was as to the liability of a national bank as a stock-

holder in another national bank. It was held that there was no solid basis for such a distinction. The court quoted from the opinion in First Nat. Bank v. Nat. Exchange Bank, supra, where it was said that

> "in the honest exercise of the power to compromise a doubtful debt, owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss."

The authorities generally recognize the distinction above pointed out. In the recent well-considered case, Tourtelot v. Whithead, 84 N. W. Rep. (No. Dak.) 8, it was held, after a careful review of the authorities, that a national bank had power to exchange notes held by it against a milling corporation, for preferred stock of that corporation issued for the purpose of raising additional capital, to be used to relieve the corporation from financial embarrassment. "The bank," it was said, "had the undoubted power to collect the debt owing to it, and, in the exercise of that right, it had the incidental power to exchange the debt for property from which it honestly and reasonably supposed it could more certainly realize the money."

It is always held to be within the powers of an ordinary mercantile corporation, which finds itself involved in debt so as to make the course reasonably advisable, to exchange all of its property for stock in a new corporation organized to take over and carry on the business.

Treadwell et al. v. Salisbury Mnfg. Co. et al., 7 Gray (Mass.) 393.

Hodges v. New England Screw Co., 1 R. I. 312.

Holmes & Griggs Mnfg. Co. v. Holmes & Wessell Metal Co., 127 N. Y. 252.

Miner's Ditch Co. v. Zellerbach, 37 Calif. 543.

So also may a trading corporation, not specifically authorized by law to hold stock in another corporation, take the same in payment of a debt.

Hodges v. New Eng. Screw Co., supra.

Howe v. Boston Carpet Co., 16 Gray (Mass.) 493.

We now call attention to a few minor suggestions made by counsel for plaintiff in error:

(a) It is contended that the stockholder's liability is limited to the payment of liabilities arising *ex contractu*, and that it does not cover damages recovered against the corporation in actions *ex delicto*. There is nothing in the constitution or statutes of Minnesota that in any way so limits the liability. Moreover, there is nothing in this record to show that any claims for torts were allowed. For that matter, it will not be presumed that the Minnesota court, in making an assessment would construe the constitution incorrectly, or allow any claims other than those properly allowable. Furthermore, this is a matter of defense, in any event. For these reasons, therefore, it is submitted that the question suggested is purely academic. It may be decided whenever it arises, but the court is not called upon to decide it in this case.

A very brief consideration, however, of the argument made in this regard by counsel for plaintiff in error, will disclose its weakness.

The case of Chase v. Curtis, 113 U. S. 452, cited by coun-

sel, is plainly distinguishable on two grounds: First, a perusal of the opinion and the authorities cited shows conclusively that, as a matter of pure construction, the statute there under consideration was held to take cognizance only of debts *ex contractu;* second, this result was arrived at principally because the statute was regarded as a highly penal one, with provisions of an extremely rigorous nature, to be construed most favorably for those sought to be charged under it, and with strictness against their alleged liability.

It remains only to point out that the Minnesota constitution, aside from being remedial and in no sense penal in its operation, leaves no room even for the construction contended for. The language is simply:

> "Each stockholder in any corporation * * * shall be liable to the amount of stock held or owned by him."

There are no words of limitation whatever. The Supreme Court of Minnesota has not only held, as heretofore shown, that the stockholder is a surety for the corporation and therefore bound for anything for which the corporation is bound, but has also held that a judgment against a corporation is of itself sufficient evidence of the claim of the judgment creditor against the stockholder.

> Frost v. St. Paul Banking & Inv. Co., 57 Minn., at p. 331.

On the construction of a somewhat similar clause in the Ohio constitution, see Rider v. Fitchey, 49 Ohio State, 285.

(b) It is also suggested by counsel for the plaintiff in error that the Minnesota court had no right to appoint a receiver of the corporation under Chapter 76, for the rea-

son that it had no tangible property to take into possession. We have already called attention to the decision of the Supreme Court of Minnesota in the case of St. Louis Car Company v. Stillwater St. Railway Co., 53 Minn. 129, where the court expressly ruled that a receiver under Chapter 76 could be appointed, although all the tangible assets of the corporation had been taken into possession by a receiver appointed under a mortgage. It being conceded that the District Court for Washington County, Minnesota, had acquired jurisdiction of the Minnesota Thresher Manufacturing Company in the suit in which the receiver was appointed, the propriety or validity of the appointment of the receiver can be questioned only in the court that appointed him, and only in a direct proceeding to test that question.

Basting v. Ankeny, 64 Minn. 133.

Oswald v. Minneapolis Times Co., 65 Minn. 249.

At page 21 of the brief of counsel for plaintiff in error it is stated that the corporation confessed judgment. Nothing of the sort appears in the declaration and it could not have been truthfully so stated as judgment was not entered by confession.

The decree appointing a receiver is entitled to full faith and credit in the federal courts and the courts of other states.

Christmas v. Russell, 5 Wallace, 290.

Maxwell v. Stewart, 22 Wallace, 77.

Van Norman v. Gordon, 172 Mass. 576.

Mooney v. Hinds, 160 Mass. 469.

American Tube & Iron Co. v. Crafts, 156 Mass. 257.

Hambleton & Co. v. Glenn, 72 Md. 331.

Not only is the judgment of the Minnesota court conclusive, but it clearly appears that under Chapter 76 it is the duty of the court to appoint a receiver in any case where a judgment is obtained, execution issued, and the same is returned unsatisfied.

(c) It is claimed that the act makes the stockholders liable for obligations arising after the declaration of insolvency. We do not see anything in the law or in any decisions under the act which points to any such construction. Therefore, the cast of Schraeder v. Manufacturing Co., 133 U. S. 67, is in no way an authority against the defendant in error. In that case a bank had gone into liquidation, and at page 75, the court calls attention to the obligation of the stockholder as expressed by statute, which was merely for contracts, debts, and engagements duly contracted in the ordinary course of business, and to the fact that that business ceased when the bank went into liquidation, and that the liquidating officers had no authority to transact any business in the name of the bank so as to bind the shareholders, except that which is implied in the duty of liquidation. In view of the fact that the obligation of the stockholder did not extend to that class of claims, this court said it was proper for the Circuit Court to examine the claim to see whether it was of the class for which stockholders were liable, as the claim had been incurred after the bank had gone into liquidation.

(d) It is also suggested that the law permits an unreasonable, and unnecessarily large assessment. But if the law is constitutional, as we have argued, by reason of the fact that the stockholder is an integral part of the corpora-

tion which was before the court when the assessment was made, then no such objection can be urged. There is no other court which can fix the amount of assessment, or consider the percentage that should be assessed, except the court that has jurisdiction over the corporation, and full provision is made in the act itself for the return to the stockholders of any amount that may be received from the assessment over and above the amount that is needed to liquidate the corporation and pay its debts.

(e) It is suggested that the stockholders are not given the right to be heard on the claims of creditors. The same considerations as to representation by the corporation, apply to this suggestion as to the preceding one. In addition to that, we have already called attention to the fact that in Hawkins v. Glenn, it appeared that the claims of creditors were adjudicated by a commissioner. The only notice given of the same was by publication, and this court in no way criticised the method thus employed, but held that the assessment levied, which was based upon the allowances of claims so made, was conclusive upon the stockholders.

Reference is several times made in the briefs of counsel, to the case of Converse v. Stewart, 105 Appellate Division, 478. That is a decision upon a suit brought by the defendant in error upon certain stock of which the defendant-Stewart was claimed to be the beneficial owner, although it, with certain other stock of the Minnesota Thresher Mfg. Co., stood in the name of certain trustees, and one question in the case was as to whether or not Stewart was in fact a stockholder. Judge Choate, in his opinion, which is annexed to this brief, held that he was such stockholder, and that he was liable. The case of Howarth v. Angle, 162 N.

Y. 179, was a suit brought by the receiver Howarth against one Angle, to recover a stockholder's assessment made in the state of Washington, being the same assessment sued on in Howarth v. Lombard, which was reviewed by the Supreme Judicial Court of Massachusetts, and to which we have frequently referred. In the trial of Howarth v. Angle, Howarth had proved in the lower court by common law evidence, the necessity for the assessment which had been levied by the courts in Washington. In the decision on the appeal, at page 179, the Court of Appeals said, among other things, that the defendant was entitled to have proof of the necessity for the amount of the assessment made against him in a proceeding to which he was not an actual party. Judge Choate considered this language a mere dictum in view of the manner in which the case had been tried in the court below, but when Converse v. Stewart came before the Appellate Division of the Supreme Court, that court held that it was bound by the language of the Court of Appeals in Howarth v. Angle, and followed the dictum. The case has not yet reached the Court of Appeals of the state of New York for final determination. A reading of the two opinions in this case of Converse v. Stewart will, we think, possibly lead to the conclusion that the Appellate Division did not consider the matter as carefully as did the Referee.

We respectfully urge that the judgment appealed from should be affirmed.

Respectfully submitted,

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N. Y. SUPREME COURT.

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THEODORE R. CONVERSE, as Receiver &c.,

against

JOHN A. STEWART.

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## OPINION OF REFEREE.

The first question is, whether the defendant Stewart was a "holder or owner" of stock within the meaning of the Constitution of Minnesota.

It is claimed by the learned counsel for the defendant that this liability created by the constitution being in derogation of the common law the provision of law should be construed strictly.

Admitting this general principle and that a defendant sought to be held should be strictly within the terms of the statute, yet this does not mean that the statute imposing a liability other than that which the common law imposes should have the narrowest possible meaning. Such statutes like all other statutes should be construed reasonably and with a view to carrying into effect the obvious purpose of the legislature in the enactment. That the liability extends to persons other than the mere record owner or stockholder to whom a certificate has been issued would seem to be obvious enough. Thus if a stockholder of record has transferred his certificate to another person, but trans-

fer had not been made on the books the transferee would seem clearly to be a stockholder within the meaning of such a statute though not a stockholder of record. It has been held in Minnesota as well as elsewhere that the statutes providing that the stock of corporations shall be transferable only on the books of the corporation, in such form as the directors prescribe, are intended solely for the benefit of the corporation; that they do not incapacitate a shareholder from transferring his stock without any entry on the corporate books (*Minnesota Gen. Stat., Chap.* 34, *Sec.* 49; *Baldwin v. Canfield,* 26 Minn. 55).

This is also the law of New York (*McNeil v. Tenth Nat. Bank,* 46 N. Y. 331).

Under the General Manufacturing Corporation Act of New York, the statute of 1848, Chap. 40, Sec. 10; stockholders are made liable for the debts, but by Section 25 it was provided that a transfer not entered in the books should be ineffective except to make the transferee liable under Section 10, and in Washburn & Moen Co. v. Clarke, 43 N. Y., State Rep. 711, it was held that where such a transferee was an actual owner at the time the debt was contracted as between him and the prior owner who still remained the record owner, the transferee was liable as stockholder. To the same effect is *Close v. Sherwood,* 5 Misc., 551.

In case of such a transfer the law implies a promise of indemnity on the part of the purchaser to the vendor against such liabilities to which the former owner may still be liable to creditors as the record owner (*Johnson v. Underhill,* 52 N. Y. 214); and in *McMahon v. Macy,* 51 N. Y., 161, it is said:

> "There is nothing in any statute which makes the books of the company incontrovertible evidence of

ownership of stock. A person may be the absolute legal and equitable owner of stock without any transfer appearing on the books."

The vendor of stock in reality assigned but not transferred on the books may be liable as the nominal holder and because he is held out to the world as a stockholder, and the vendee may be held because he is in reality the stockholder.

These New York cases, however, have only a general bearing upon the question here as showing how the courts in interpreting similar statutes or statutes imposing personal liability on stockholders are largely controlled by the purpose of the Act which is to make each share bear its equal portion of a common burden and to make the law effective for that purpose.

The cases under the Manufacturing Act of 1848 could not, however, have been otherwise decided considering the provisions of section 25 above quoted, for that necessarily implies that the transferee, although not the record owner is liable for the debts.

*In Pioneer Fuel Co. v. St. Peter Street I. Co.*, 64 Minn. 386, it was sought to hold as a stockholder or owner a person who had transferred his stock, but the complaint alleged that the transfer was made for the purpose of avoiding the stockholders' liability and not in good faith; that it was without consideration; and that the transferrer was still the beneficial owner and holder of said stock and liable thereon. The complaint was held good.

In *Harper v. Carroll*, 66 Minn. 505, the stock had been transferred to one Jenks, but the transfer had not been

entered on the books. It was held that the liability could be enforced against the former owner who was still stockholder of record even although it might be true that the creditor would have the like remedy against the transferee Jenks.

The rule is laid down in that case that the creditors are entitled to look solely to the liability of the persons who appear by the books to have been stockholders.

In *Basting v. Northern Trust Company,* 61 Minn. 311, it was held that a transferee was liable to the corporation for the payment of calls on the stock, although the transfer was not of record, in a case where the corporation had recognized the transferee as the owner of the stock. And in *Holland v. Duluth Iron Mining Co.,* 68 N. W. Rep., persons were held liable as stockholders, although no certificates were ever issued to them where they had acted and been treated as such by the corporation and could at any time have called for their stock.

It cannot, I think, be said that there is any decision of the Minnesota Court which conclusively decides that in a case exactly like the present the defendant was a holder or owner of the stock within the meaning of the Constitution. There is a clear distinction to be made between a person to whom stock has been transferred, though the transfer is not entered on the books, and a person situated with reference to the stock as this defendant was after the expiration of the voting trust. A person to whom a certificate is transferred may be more clearly and certainly said to be a stockholder than a person who has an equitable title to the stock or a right to demand a transfer to be made to himself. The voting trust in the case at bar expired at the end of five years. The trustee of the voting

trust had received the defendant's stock in another company and had surrendered it under authority of the trust instrument and had taken out certificates in their own names as trustees for the 400 shares of stock in the Thresher Company for which it was exchangeable. During the running of the voting trust the defendant would have had no right to demand the stock. The terms of the trust agreement required it to remain in the names of the trustees who had a right to vote thereon. But at the end of the five years this trust came to an end. If any trust continued with regard to the stock it was simply a trust to hold it till the defendant demanded it and then to procure the issue of a new certificate to him. The relation of the trustees to the defendant from the time of the expiration of the trust was rather one of agency than of trust. They held 400 shares of stock which really belonged to him, in respect to which they had no existing active trust relation or duty nor even the right to vote.

I think the reasonable and fair meaning of the Minnesota Constitution is that it covers the case of a person situated as the defendant was with reference to this stock, namely, the real owner of it, although the record title was in another person of whom he had at any time the right to demand a transfer.

Some aid to the plaintiff's claim that such construction should be given to the statute is derived from the legislation and the decisions of the courts with regard to the liability of shareholders in national banks.

Under the Revised Statutes of the United States, Sec. 5151, it was declared that shareholders were liable up to the amount of the stock held by them. There was no more exact definition of shareholders in the case of the National

Banks in this action than of the stockholders under the Minnesota Constitution. Perhaps the language of the Minnesota Constitution is broader than that of the Revised Statutes with regard to shareholders in banks. The expression "stock held or owned by them" may well be said to give a construction to the word "stockholders" and show an intention to extend that term beyond those who were technically "stockholders." Yet under this statute relating to national banks it has been held as a necessary result in order to carry into effect the obvious purpose of the legislature that the real owner is liable for the assessment, although he be not the stockholder of record. Thus in *Hubbell v. Houghton*, 86 Fed . Rep. 547; same case on appeal, *Houghton v. Hubbell*, 91 Fed. Rep. 453; it was held that a person for whose account bank stock was bought and held by an agent in the agent's name was the shareholder within the meaning of the statute. So the real owner was held in the case of *Davis v. Stevens*, 17 Blatch. 259, although the stock stood in the name of another person and most of it never was in the name of the real owner, the motive for putting the shares in the name of another being to protect the real owner from liability under the statute. This decision is approved and followed in Bowdein v. Johnson, 107 U. S. 262, where a transfer to avoid such liability was held fraudulent and void as to creditors.

In *Pauly v. State Loan & Tr. Co.*, 165 U. S., 623, it is said:

> "Congress did not say that those only should be regarded as shareholders, liable for the contracts, debts and engagements of the banking association whose names appear on the stock list distinctly as shareholders. * * * As already indicated, those

> may be treated as shareholders within the meaning of Section 5151 who are the real owners of the stock, or who hold themselves out, or allow themselves to be held out, as owners in such way and under such circumstances as, upon principles of fair dealing, will estop them as against creditors, from claiming that they were not in fact owners."

These cases showing the interpretation that has been put upon the National Bank Statute are especially in point as showing the interpretation put by the courts upon a similar statute or a statute having a similar purpose. The liability was one as much in derogation of the rules of the common law as the liability under the Minnesota Constitution; yet a meaning was given to the statute which would make it effectual for carrying out the purpose of the legislature. The language used was not restricted to the narrowest meaning which the term shareholder would bear. In *Matteson v. Bent,* 176 U. S. 521, however, it is said that the decisions of that Court hold the record or legal owner liable and the exception which that court has recognized is limited to the cases which amount to a fraud on the statute. That element did not exist in Houghton v. Hubbell or in this case. So that it cannot be said that the Supreme Court has yet held that in a case like this the real owner not being the record owner would be liable under Sec. 5151.

The Statute of Minnesota for the purpose of giving a remedy to creditors contained the provisions,

> "that persons holding stock in a corporation as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders, but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator,

intestate, ward or person interested in the trust fund would be if they were respectively living and competent to act and held the stock in their own names."

I think this statute has no bearing upon the question. The class of trusts referred to in this statute are as it seems to me an entirely different class of trusts from that which existed after the expiration of the voting trust. It may be doubted whether this statute is effectual to protect trustees who are record owners of stock in a Minnesota corporation from liability. It would seem that while the legislature of Minnesota might impose any further or additional liabilities upon holders or owners of stock becoming such after the passage of the Act they could not exempt persons who were made liable under the Constitution itself or substitute a fund in the hands of a stockholder for his personal liability.

See Allen v. Walsh, 25 Minn., 543, 551.

In the case of *Cole v. Satsop R. R. Co.*, 9 Wash., 487, it was held that although stock in a corporation has been subscribed for by an individual "as trustee," an action on the subscription may be maintained against the real party in interest when the complaint alleges that such trustee made the subscription as the agent of the defendants at their request and under agreement with them for the benefit of each of the defendants in proportion to his individual subscription. The action was by the receiver of an insolvent corporation to recover unpaid subscriptions. The act exempted executors and trustees, etc., and made the funds in their hands liable in the usual form, as in the Minnesota Statute, and in the national banking law, but this provision was held to have no bearing. Although the

stock was registered in the name of a trustee nominally this trustee was a mere agent. Averments of the complaint amounted to a statement of relation of agency between the record owner and the real owner.

While therefore there is no case exactly like the present one either under the laws of Minnesota or perhaps of any other state, in which the relation of the person sought to be treated as stockholder to the shares is exactly like the present, I think the foregoing authorities do sustain the plaintiff's position that the defendant is to be treated as the owner of the stock within the meaning of the Minnesota Constitution—that the constitutional provision may reasonably be given a construction broad enough to include the case of the defendant.

The right of a plaintiff, a receiver appointed for that purpose in another state, to enforce this liability in behalf of creditors under a statute such as that of Minnesota of 1899, cannot, I think, be successfully denied (Howarth v. Angle, 39 App. Div., 155; S. C. 162, N. Y. 179).

The plaintiff in this case is as clearly a quasi assignee of the cause of action for the benefit of creditors as was the plaintiff in that case under the laws of Washington.

Moreover the litigation in the Federal Courts in which the Minnesota act of 1899 and the prior act of 1894 have been the subject of inquiry, has reached this result as it seems to me that a receiver duly appointed under the Act of 1899 can maintain an action to recover against the stockholder in an action at law in another state (Burget v. Robinson, 113 Fed. Rep. 669; 188 U. S. 739; 123 Fed. Rep. 262; Hale v. Allinson, 188 U. S. 60; 181 U. S. 619; Evans v. Nellis, 187 U. S. 271; Hale v. Hardon, 89 Fed. Rep. 283; same case, 95 Fed. Rep. 747; Hale v. Hilliker,

109 Fed. Rep. 273; Hilliker v. Hale, 117 Fed. Rep. 220; Finney v. Guy, 189 U. S. 335).

These cases show that while under the prior act of 1894, the receiver appointed by the Minnesota Court was held to be simply an officer of the court and not a quasi assignee of the cause of action, the receiver under the Act of 1899 was such quasi assignee and vested with such title to the claim against the stockholder that he could maintain the action to recover the assessment in any jurisdiction.

It is objected further by the defendant that the assessment in this case was laid to cover not only the original debt, but the receiver's expenses incurred and to be incurred and the fees of the receiver and of his counsel in Minnesota and elsewhere, and it is insisted that these expenses are not part of the debt due from the corporation for which the constitution makes the stockholder liable and which the stockholder may have impliedly contracted to pay by his becoming such stockholder and that this being so the Act of 1899 is unconstitutional as impairing the obligation of the contract of the defendant and taking his property without due process of law in violation of the Constitution of the United States and of that of the State of New York. It is further claimed by the defendant that as he was not brought within the jurisdiction of the court at the time of the hearing and proceedings for the determining of the amount of the assessment he is not concluded as to contest the reasonableness and amount properly chargeable for these expenses of the receiver.

The question whether the addition of these expenses under the Act of 1899, impairs or makes more onerous the obligation of the defendant's contract depends, in the first place, upon whether these additional expenses with his

share of which he is charged by the proceedings, is an obligation of the corporation for which, whenever afterwards incurred, he became bound under the Constitution of Minnesota by becoming a stockholder, or, in the second place, if not properly regarded as an obligation of the corporation, whether the imposing of these expenses as a part of the scheme for the winding up and liquidation of the affairs of the Company was merely a proper part of a remedial system for the enforcement of the debts of the corporation. In either case this defense must fail. The proceeding, it seems to me, under the Act of 1899, taken as a whole and including this provision about the appointment of a receiver and providing for the payment of his fees and expenses, is simply a new remedy for the enforcement of the stockholders' liability which it was competent for the legislature of Minnesota at any time to enact.

This same objection was made in the case of Straw & Ellsworth Mfg. Co. v. Kilbourne Boot & Shoe Co., 80 Minn. 125, same case, 83 N. W. Rep. 36; and carefully considered by the Supreme Court of Minnesota and overruled on the ground that the scheme of the Act of 1899 was remedial only, for the purpose of enforcing the constitutional obligation and effected no substantial change in that obligation. This decision was approved by Judge Lowell in Robinson v. Brown, 126 Fed. Rep. 429.

I think it may also be very fairly contended that these expenses attending the proceedings against a corporation and its stockholders for the liquidation of its affairs are in the nature of costs and primarily an obligation of the corporation itself for which the stockholder is bound under the constitution.

The appointment of a receiver for the purpose of liquid-

ating the affairs of an insolvent corporation is a common and proper mode of accomplishing that end and ordinarily the fees and expenses of the receiver are paid out of the assets of the insolvent estate (See Harper v. Carroll, 66 Minn. 487, S. C. 69 N. W. Rep. 613). And the court appointing the receiver is the proper court, indeed properly the only tribunal to pass on the question of the receiver's fees and expenses. Thus these expenses are a mere incident of the receivership and of the remedy prescribd by the legislature of Minnesota. So also the remedial system adopted by providing for payment of the excess of debt over assets by an equitable assessment on the stockholders is an appropriate and just method for a final winding up of the affairs of the corporation. It is not an unusual remedy and is far more considerate of the rights and interest of individual stockholders than separate actions at law against them by creditors.

As regards the claimed right of the defendant to contest the propriety of the addition of the expenses—their reasonableness, etc., and the necessity for and proper amount of the assessment—I think the weight of authority is that on questions of this character he, as a stockholder, is bound by the judgment in that respect in the proceeding against the corporation.

The learned counsel for the defendant cites a passage from the opinion of the Court in the case of Howarth v. Angle, 162 N. Y., 188, where the Court say:

> "The stockholders, however, may controvert in our courts all the essential facts, such as insolvency, the amount of the deficiency and the like, whether they are established by the judgment appointing the receiver or not. They may require strict common law proof as to all the facts upon which the deficiency is

based, and may contest any unreasonable expenditure in the conversion of assets and the collection of accounts, including extravagant allowances to attorneys or counsel. Upon all these questions the defendant has had his day in the courts of this state, and the united action of the courts below have conclusively determined them against him."

In the view which the Court of Appeals took of the record before them these questions were not open upon the appeal, having been passed upon by the court below and affirmed by the unanimous opinion of the Appellate Division (9, 185). The question therefore to what extent these issues would have been open to contest if not thus conclusively determined as matters of fact against the defendant in the Court below was not a point essential to the decision of the Court of Appeals; and with all respect for this dictum of the Court of Appeals I think the weight of authority is that the stockholder is concluded by the judgment of the court in the proceeding against the corporation; that in such corporate matters he is in fact represented by the corporation and in law bound as a privy. (See Glenn v. Liggett, 135 U. S. 533, 544; Howarth v. Lombard, 175 Mass. 570; S. C. 56 N. E. Rep. 888, 890, 891, and cases there cited; Childs v. Cleaves, Sup. Ct. of Maine, 50 Atl. Rep. 714).

The courts of the home state of the corporation must certainly be competent to entertain jurisdiction, if the legislature of the state sees fit to confer it upon them, of any proper remedial proceeding for the winding up of an insolvent corporation, the ascertainment of its debts, the application of its assets to the payment of its debts and the determination of the amount which the stockholders should

contribute towards the deficit in cases whereby the law under which they become stockholders they were made liable and which by becoming stockholders they impliedly contracted to pay, such contributions being in effect assets to which creditors can resort. Such obligations of stockholders are not penal, but contractual in their nature (Whitman v. Oxford Nat. Bank, 176 U. S. 559). And it has been so held by the Supreme Court of Minnesota (Hanson v. Davison, 76 N. W. Rep. 254, 255).

The real question here is, what effect are the courts of New York bound to give to the judgment or decree of the Court of Minnesota. If the Statute of Minnesota is constitutional in that it does not impair the obligation of the contract and the appointment of a receiver with the usual incidents of such appointment and the laying of an assessment on the stock, constitute a proper remedy in such a proceeding, and the judgment pronounced in the proceeding referred to determining the amount of the assessment required for the payment of the debt is, by the law of Minnesota, a conclusive judgment binding upon the stockholders, although they were not personally parties to the proceeding in that state, then the judgment must have the same effect in the State of New York. (See Nat. Bank v. Farnum, 176 U. S. 640).

The Statute of Minnesota is explicit that the judgment of the Court with regard to the required assessment in this proceeding against the corporation shall bind all stockholders, leaving open to a person sued as a stockholder elsewhere the question whether he is a stockholder and for how many shares, and whether he has in any way paid the claim in whole or in part or has an offset to the same. Such a proceeding is a proceeding in rem or an insolvency

proceeding against the corporation in which all its stockholders are as it seems to me, deemed in law present and represented through the corporation, and concluded by the result so far as respects the necessity and amount of the assessment.

The practical effect of holding this question of the amount of assessment open notwithstanding the judgment in the Court of Minnesota would be that in any jurisdiction it would be open to any stockholder to contest the reasonableness of the receiver's expenses or fees or the necessity, propriety or amount of the assessment made in that proceeding upon the stockholders for the payment of the debts of the corporation. This would virtually defeat the principal purpose of the Act to have a final liquidation of the affairs of the corporation made in one proceeding. If such liquidation cannot be had in the state where the corporation exists it would seem that it cannot be had anywhere. Certainly the courts of this state in an action against a stockholder would not have before them or within their jurisdiction the necessary parties to determine these questions. The corporation itself would seem to be a necessary party. Virtually the defendant claims the right to have the case in the Minnesota court retried as to its principal issues in this action against him. The defendant's answer also raises no issue as to the reasonableness of the receiver' expenses and there is certainly no evidence of their unreasonableness which would justify the conclusion if the point were open that the foreign judgment is being enforced unjustly against a citizen of this state or that the enforcement violates the public policy of this state (Bank of China v. Morse, 168 N. Y. 458, 481, 482). It would seem that any surplus of the assessment not re-

quired for the final liquidation equitably belongs to and could be recovered by the stockholders contributing it. The liability has been construed to mean not a mere pro rata liability in proportion to the shares held, but a liability up to the amount of stock held if in fact required for the security of creditors (Bank v. Plow Co., 58 Minn. 167, 59 N. W. 997). So that it is necessary for the court in determining the amount of assessment to make allowance for the probable inability of some stockholders to respond to the assessment.

No point has been made that under the Bankrupt Act of 1898 the court of bankruptcy had exclusive jurisdiction of such a proceeding.

I think, therefore, the plaintiff is entitled to judgment for the amount demanded, with interest from the time when under the order of the court it should have been paid.

The plaintiff's counsel may present and serve on the counsel for the defendant a report and findings in conformity with this opinion, and within ten days thereafter the defendant's counsel may submit to the referee any additional findings desired by him or any modifications of the findings proposed by the plaintiff.

N. York, Oct. 24, 1904.

WM. G. CHOATE,
Referee.

# Supreme Court of the United States.

No. 176.—October Term, 1905.

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| First National Bank of Ottawa, Illinois, Plaintiff in Error, *vs.* Theodore R. Converse, Receiver of the Minnesota Thresher Manufacturing Company. | In error to the Circuit Court of the United States for the Northern District of Illinois. |

[February 19, 1906.]

For brevity, the plaintiff in error will be hereafter referred to as the bank and the defendant in error as the receiver.

The receiver commenced this action against the bank in the Circuit Court of the United States for the Northern District of Illinois. The object of the action was to recover from the bank, as the owner of 274 shares of preferred stock in the Minnesota Thresher Manufacturing Company, the amount of an assessment of eighteen dollars per share, levied upon said stock for the payment of the debts of the thresher company. A demurrer to an amended declaration having been overruled, and the bank electing not to plead further, judgment was entered for the receiver, and, on account of constitutional questions raised by the demurrer, the case was brought directly to this court.

The averments of the amended declaration may be summarized as follows: In May, 1884, the Northwestern Manufacturing and Car Company was a corporation, engaged in the manufacturing business at Stillwater, Minnesota. At the date mentioned the car company owed a large amount of debt, which it was unable to pay, among which was a sum due to the bank for money lent. In that month a receiver was appointed for the car company by a court of the State of Minnesota having jurisdiction. Some time afterwards, in November, 1884, the bank with other creditors, and some of the stockholders of the car company, organized under the laws of Minnesota a new corporation, styled the Minnesota Thresher Manufacturing Company. The articles of incorporation of the new company provided "that the objects for which said corporation was formed were the purchase of the capital stock, evidences of indebtedness issued by and the assets of the Northwestern Manufacturing and Car Company, a corporation existing under the laws of the State of Minnesota, or any portion of said capital stock, evidences of indebtedness or assets, and the manufacture and sale of steam engines, of all kinds, farm implements and machinery of all kinds, and the manufacture and sale of all articles, imple-

ments and machinery of which wood and iron or either of them form the principal component parts, and the manufacture of the materials therein used."

The thresher company exchanged its preferred stock at par for the debts of the car company and issued common stock in exchange for the preferred stock of the car company. Subsequently at a judicial sale the new company acquired all the assets of the car company and paid for the same with the claims which it had acquired for issuing its common stock as above stated. The stock held by the bank upon which the assessment was sought to be enforced was alleged to have been acquired by the bank in the manner above stated, that is, by an exchange of its claim against the car company for the preferred stock of the new corporation. The declaration alleged that at the time of the acquisition of the stock by the bank, as above stated, under the constitution and laws of Minnesota, there was a double liability imposed upon the stockholders to pay the debts of the corporation in the event of its insolvency.

After the organization of the thresher company and the purchase of the assets of the car company, as above stated, the thresher company carried on the maufacturing business authorized by its charter. In 1901 it became insolvent. A creditor having sued and obtained judgment, and an execution having been issued and returned unsatisfied, the creditor procured, under the provisions of chapter 76 of the General Statutes of Minnesota and the amendments thereto, the appointment of a receiver of the property of the thresher company, who duly qualified and entered upon the discharge of his duties. In the proceeding in which the receiver was appointed creditors exhibited claims and demands against the thresher company, aggregating $443,752.17, but no property or assets of the corporation existed available to pay this indebtedness or any portion thereof.

Thereafter, upon petition of the receiver, pursuant to the provisions of chapter 272 of the General Laws of Minnesota for 1899, copied in the margin,* steps were taken to provide a fund for the payment of the debts

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*General Laws of Minnesota for 1899.

Chapter 272.

"An act to provide for the better enforcement of the liability of stockholders of corporations.

"SEC. 1. Whenever any corporation created or existing by or under the laws of the State of Minnesota, whose stockholders, or any of them, are liable to it or to its creditors, or for the benefit of its creditors, upon or on account of any liability for or upon or growing out of, or in respect to the stock or shares at any time held or owned by such stockholders, respectively, whether under or by virtue of the constitution and laws of said State of Minnesota, or any statute of said State, or otherwise, has heretofore made, or shall hereafter make an assignment for the benefit of

of the corporation, by enforcing contribution from its stockholders upon the double liability alleged to result from the ownership of its stock. The bank did not appear in the proceeding.

After compliance with the requirements of the act of 1899 the court made an assessment of eighteen dollars upon each of the shares of the stock of the thresher company, and the receiver was authorized and directed, in the event of the failure of a stockholder to pay, after due notice by mail, "to forthwith institute and prosecute such action or actions or other proceedings against such person, persons, corporation or party liable in any court having jurisdiction, whether in this State or elsewhere, which said receiver may deem necessary or proper for the recovery of the amount due from such person, persons, corporation or party under the terms of this order." After alleging the default of the bank to pay the assessment, the amended declaration prayed for a judgment against the bank for the sum of the assessment, that is, eighteen dollars per share on the 274 shares of stock of the thresher company, which stood on the books of that company in the name of the bank.

As stated at the outset, the bank demurred to the amended declaration, and, on the demurrer being overruled, stood upon the demurrer and judg-

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its creditors under the insolvency laws of this State; or whenever a receiver for any such corporation has heretofore been or shall hereafter be appointed by any District Court of this State, whether under or pursuant to any of the provisions of chapter seventy-six (76) of the General Statutes of eighteen hundred and ninety-four (1894) of Minnesota, and the acts amendatory thereof, or under or pursuant to any other statute of this State, or under the general equity powers and practice of such court; the District Court appointing such receiver, or having jurisdiction of the matter of said assignment, may proceed as in this act provided.

"SEC. 2. Under the petition of the assignee or the receiver of any such corporation, or of any credit of such corporation, who has filed his claim in such assignment or receivership proceedings, the said District Court shall, by order, appoint a time for hearing not less than thirty (30) nor more than sixty (60) days from the time of filing said petition with the clerk of said court, and shall direct such notice of such hearing to be given to the party presenting said petition, by publication or otherwise, as the court, in its discretion, may deem proper; but if said petition be filed by a creditor, other than the assignee or receiver of said corporation, the court shall direct that notice of such hearing be personally served on such assignee or receiver.

"SEC. 3. At such hearing the court shall consider such proofs, by affidavit or otherwise, as may then be offered by the assignee or receiver, or by any creditor or officer or stockholder of said corporation, who may appear in person or by attorney, as to the probable indebtedness of said corporation, and the expenses of said assignment or receivership, and the probable amount of assets available for the payment of such indebtedness and expenses, and also as to what parties are or may be liable as stockholders of said corporation, and the nature and extent of such liability. And if it appear to the satisfaction of the court that the ordinary assets

ment was entered against it as prayed for. The grounds upon which the amended declaration was demurred to were as follows:

"(1.) It does not state facts sufficient to constitute a cause of action against the defendant.

"(2.) It does not show that plaintiff has legal capacity to institute and maintain the present action.

"(3.) It shows that said supposed Laws of Minnesota for 1899 are in contravention of clause 1 of section 10 of article 1 of the Constitution of the United States.

"(4.) It shows that said supposed Laws of Minnesota for 1899 are in contravention of the Fourteenth Amendment of the Constitution of the United States.

"(5.) It shows that said supposed Laws of Minnesota for 1899, being 'An act to provide for the better enforcement of the liability of stockholders of corporations,' are in contravention of the Constitution of the United States.

"(6.) It shows that said supposed Laws of Minnesota for 1899 unjustly discriminate against non-resident stockholders and are such as will not be enforced in this jurisdiction.

"(7.) It shows that the supposed order of the court levied an assessment on stockholders that is excessive and beyond reason.

"(8.) It does not show that the supposed corporate indebtedness is contractual or that it has been judically determined as against this defendant.

"(9.) It does not show that all the necessary steps prescribed by the supposed laws of Minnesota have been taken.

"(10.) It shows, as a basis of liability, supposed acts of the defendant which are *ultra vires* and void under the national bank act.

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of said corporation, or such amount as may be realized therefrom within a reasonable time, will probably be insufficient to pay and discharge in full and without delay, its indebtedness, and the expenses of such assignment or receivership, and that it is necessary or proper that resort be had to such liability of the stockholders, the said court shall thereupon, by order, direct and levy a ratable assessment upon all parties liable as stockholders or upon or on account of any stock or shares of said corporation, for such amount, proportion or percentage of the liability upon or on account of each share of said stock as the court, in its discretion, may deem proper (taking into account the probable solvency or insolvency of stockholders, and the probable expenses of collecting the assessment;) and shall direct the payment of the amount so assessed against each share of said stock to the assignee or receiver within such time thereafter as said court may specify in said order.

"SEC. 4. Said order shall direct the assignee or receiver to proceed to collect the amount so assessed against each share of said stock from the parties liable therefor; and shall direct and authorize said assignee or receiver in case of the failure of any party liable upon or on account of any share or shares of said stock, to so pay the amount so assessed against the same, within the time specified in said order, to prosecute action against each and every such party so failing to pay the same, wherever such party may be found, whether in this State or elsewhere.

"SEC. 5. Said order and the assessment thereby levied shall be conclusive upon and against all parties liable upon or on account of any stock or shares of said corporation, whether appearing or represented at said hearing or having notice thereof

"(11.) It states conclusions of the pleader instead of facts.
"(12.) It does not allege a case within the jurisdiction of this court.
"(13.) It is, in other respects, uncertain, informal and insufficient."

Mr. Justice WHITE, after making the foregoing statement, delivered the opinion of the Court.

The questions principally discussed at bar relate to the alleged repugnancy to the Constitution of the United States of the Minnesota law of 1899, by virtue of which the receiver asserted his power and authority to sue in a court of another jurisdiction than that of Minnesota to enforce the assessment made by the court of Minnesota on the stockholders of the thresher company. But antecedent to that question we must consider and dispose of the propositions arising from the tenth ground of the demurrer, that is, that under the averments of the bill there was no liability on the bank, as the facts alleged from which it is asserted the liability arose showed that the act of the bank in subscribing to the stock was *ultra vires* and prohibited by the provisions of the national banking act. We say this is antecedent because, if from the averments of the declaration, aside from the validity or invalidity of the act of 1899, there could be no liability on the bank to pay the assessment, it will be unnecessary to consider whether the Minnesota statute added such conditions to the obligation resulting from the stock subscription at the time it was made as to cause the statute to be repugnant to the contract or any other clause of the Constitution of the United States.

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or not, as to all matters relating to the amount of and the propriety of and necessity for the said assessment. This provision shall also apply to any subsequent assessment levied by said court as hereinafter provided.

"SEC. 6. It shall be the duty of such assignee or receiver, to and he may, immediately after the expiration of the time specified in said order for the payment of the amount to be assessed by the parties liable therefor, institute and maintain an action or actions against any and every party liable upon or on account of any share or shares of such stock who has failed to pay the amount so assessed against the same, for the amount for which such party is liable. Said actions may be maintained against each stockholder, severally, in this State or in any other State or country where such stockholder, or any property subject to attachment, garnishment or other process in an action against such stockholder, may be found. But if said assignee or receiver shall in good faith believe any stockholder so liable to be insolvent, or that the expense of prosecuting such action against such stockholder will be so great that it will be of advantage to the estate and interest of creditors to prosecute the same, said assignee or receiver shall so report to said court; and shall not be required to institute or prosecute any such action unless specifically directed so to do by said court. And in such case said court shall not require said receiver to institute or maintain such action unless said court shall have reasonable cause to believe that the result of such action will be of advantage to the estate and creditors of said corporation except as hereinafter provided."

At the time the bank took the stock in the thresher company it was provided in section 3 of article X of the constitution of Minnesota as follows: "Each stockholder in any corporation (except those organized for the purpose of carrying on any kind of manufacturing or mechanical business) shall be liable to the amount of stock held or owned by him."

If the thresher company was organized solely for manufacturing purposes, it is of course apparent that under this provision of the Minnesota constitution the stockholders of the company would not be liable for its debts. (*Senour Mfg. Co.* v. *Church Paint & Mfg. Co.*, 81 Minn. 294.) It has, however, been decided by the Supreme Court of Minnesota that unless it unquestionably appears that a Minnesota corporation claiming to be a manufacturing corporation was organized for the exclusive purpose of engaging in manufacturing and such incidental business as might be reasonably necessary for effecting that purpose, the exception in the Minnesota constitution to which reference has been made would not apply, and the double liability would result. (*State* v. *Minnesota Thresher Co.*, 40 Minn. 213; *Merchants' Nat. Bank* v. *Thresher Mfg. Co.*, 90 Ib. 144.) These cases, it is to be observed, referred to the very act of incorporation upon which the liability of the bank, if at all, must rest. It clearly appears, from the comments of the Supreme Court of Minnesota upon the charter, that in the articles of association the thresher company was declared to be organized under the law of Minnesota relating to manufacturing corporations as a class exempt from double liability, and that the motives of the incorporators were to obtain immunity from the double liability. The court, however, held that the mere law under which the corporation was organized, and the motive therefor, would not suffice to bring the incorporators within the control of the exemption accorded by the constitutional provision, if from the articles of association it did not clearly appear that the corporation was confined solely to a manufacturing business and its incidents. The doctrine of the court was thus clearly stated (90 Minn. p. 147):

"It is immaterial that the corporation was organized under the statute providing for organizing manufacturing corporations or what the actual intention of the incorporators was, or that the corporation in fact carried on only a manufacturing business, but its articles of incorporation are the sole criterion as to such intention and the purposes for which the corporation was organized; and, unless it fairly appears therefrom that it was organized for the exclusive purpose of engaging in manufacturing and such incidental business as may be reasonably necessary for effectuating the purpose of its organization, its stockholders are not within the exception to the general rule of constitutional liability of stockholders for the debts of their corporation."

And further along in the opinion the declaration was reiterated (p. 148) that the intention of the corporators could not be ascertained by reference

to matters not appearing on the face of the articles of association, and that the articles were the sole criterion as to the purpose for which a corporation was formed, "that is, for ascertaining the intention of the associates." Applying this rule to the articles of association of the thresher company, the court found that the acquisition of the stock, etc., of the car company was a business independently to be engaged in and was not incidental to that of manufacturing, and, hence, that the corporation was not within the exception embodied in the constitutional provision imposing a double liability upon stockholders.

Now, the exclusive and only ground upon which the Supreme Court of Minnesota, in construing the articles of association of the thresher company, held that the articles embodied a distinct business from that of manufacturing, is plainly made manifest by the opinions expressed by the court in the two cases to which we have referred. In the earlier case the court said (40 Minn. p. 223):

"It is clear, therefore, to our minds that, under the act of 1873, a corporation can only be organized for carrying on an exclusively manufacturing or mechanical business, which, of course, includes anything that is properly incidental to or necessarily connected with such business. A corporation organized to carry on manufacturing and also some other lawful, but independent, business, belongs to the class authorized by title 2, c. 34, (sections 109–119.) With this construction of the law in mind, it is not difficult, on examination of respondent's articles of association, to determine to what class it belongs. One of the declared objects of its formation is to purchase the capital stock and evidences of indebtedness of the car company, a business in nowise incident to or properly connected with that of manufacturing. The contention of counsel to the contrary cannot be seriously entertained for a moment. If a manufacturing corporation desires to buy the plant of another corporation formerly engaged in the same business, that is legitimate, and if, in order to get it, it becomes necessary to buy with it some other property, not needed for nor connected with the manufacturing business, this also would be permissible, if done as incidental to the main purpose of securing the plant; but no such reason or excuse existed for buying the stock and indebtedness of the car company. Indeed, it would be difficult to imagine anything more foreign to or inconsistent with a legitimate manufacturing business than for a corporation to invest all its capital in the stock and indebtedness of another and insolvent corporation. Under title 2, a corporation can be organized to carry on any lawful business, and, if parties desire to deal in such speculative property, they can do so under that title, but not under the act of 1873, even by connecting it with manufacturing. Our conclusion, therefore, is that respondent is a corporation of the class authorized by title 2. That is what the corporators themselves themselves have characterized it by their statement of the objects of its formation."

In the latter case, after restating the rule that the face of the articles of association was the sole criterion as to the purpose for which the corporation was formed, the court said (90 Minn. p. 148):

"Now, taking the articles in question by the four corners, and reading them in the light of the rule we have stated, without resorting to technicalities, does it fairly appear therefrom that the corporation was organized for the exclusive purpose of engaging in manufacturing and business incidental thereto and reasonably necessary for carrying into effect such purpose? We answer the question in the negative. There are two general purposes for which the corporation was organized as declared by the articles—one the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action, and assets of the Northwestern Manufacturing & Car Company mentioned in the articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then existing corporation. Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood and iron, or either of them."

Accepting this construction given by the Supreme Court of Minnesota to the articles of association by which alone the incorporators under those articles can be taken out of the exemption accorded by the constitution of Minnesota, it follows that the thresher company was organized to embark in the purely speculative business of buying and selling the stock and assets of an existing and insolvent corporation, with power, but without the obligation, to engage as an independent enterprise in a manufacturing business.

Now, the limitations upon the powers of national banks were clearly pointed out in *California National Bank* v. *Kennedy*, (167 U. S. 362,) where it was said (p. 366):

"It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted or which are incidental to carrying on the business for which they are established. (*Logan County Nat. Bank* v. *Townsend*, 139 U. S. 67, 73.) No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. (*Germania Nat. Bank* v. *Case*, 99 U. S. 628.) So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. (*First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 128.)"

As no authority, express or implied, has ever been conferred by the statutes of the United States upon a national bank to engage in or promote a purely speculative business or adventure, accepting the view of the articles of association by which the bank was denied the benefit of the exemption accorded by the constitution of Minnesota, it follows that the bank had no power to engage in such business by taking stock or otherwise. The power of a national bank to engage in the character of business which the articles of association of the thresher company manifested, as defined by the Supreme Court of Minnesota, cannot be inferred to have been possessed by the bank as an incident of securing a present loan of money or as a means of protecting itself from loss upon a pre-existing indebtedness. To concede that a national bank has ordinarily the right to take stock in another corporation as collateral for a present loan or as security for a pre-existing debt, does not imply that because a national bank has lent money to a corporation it may become an organizer and take stock in a new and speculative venture; in other words, do the very thing which the previous decisions of this court have held cannot be done.

The speculative venture, therefore, which the bank undertook, as held by the Minnesota court, when it engaged in taking the stock in the thresher company being *ultra vires*, it follows, under the settled rules hitherto applied by this court, that the bank, despite the subscription, was entitled to plead its want of authority as a defense to the claim of the receiver. The doctrine on the subject was stated in *De la Vergne Co.* v. *German Savings Inst.*, (175 U. S. 40,) where it was said (p. 59):

"The doctrine that no recovery can be had upon the contract is based upon the theory that it is for the interest of the public that corporations should not transcend the limits of their charters; that the property of stockholders should not be put to the risk of engagements which they did not undertake; that if the contract be prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter, whether such charter be a private act or a general law under which corporations of this class are organized."

And, moreover, the authorities cited in the case just referred to conclusively establish that the principle which the case announced as to the power of a corporation to avail of the defense of *ultra vires* had been previously conclusively settled in this court. Indeed, the case arising on the record presents an obvious dilemma, which is this: If the construction of the articles of association given by the Supreme Court of the State of Minnesota, by which alone the double liability can be enforced, is accepted, then there was no liability because of *ultra vires*. If, on the other hand, we were to disregard the construction given by the Supreme Court of Minnesota to the articles of association we should be constrained to the conclusion that those articles but endowed the incorporators of the thresher

company with the power to carry on a manufacturing business, and as a mere incident to acquire for the purposes of such business the property of the car company; and it would follow that there was no double liability, by force of the exception created in the Constitution of Minnesota.

*The judgment must be reversed and the case remanded with directions to sustain the demurrer and enter judgment for the bank.*

Mr. Justice HARLAN concurs solely upon the authority of *California National Bank* v. *Kennedy* and the previous cases, announcing the doctrine which was adhered to and applied in that case.

True copy.

Test:

*Clerk Supreme Court, U. S.*

# Supreme Court of the United States.

No. 176.—October Term, 1905.

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| First National Bank of Ottawa, Illinois, Plaintiff in Error, vs. Theodore R. Converse, Receiver of the Minnesota Thresher Manufacturing Company. | In error to the Circuit Court of the United States for the Northern District of Illinois. |

[February 19, 1906.]

Mr. Justice Brewer dissenting.

I am unable to concur in the opinion and judgment in this case, and will briefly state the grounds of my dissent.

There is nothing in the organization of a national bank that puts it outside of the ordinary rules governing corporations, whether we consider the rights, obligations or the remedies in actions by or against it. Section 5136, Rev. Stat. prescribes the terms of its charter. It is authorized to do a banking business, and, like any other corporation, its powers are limited by the terms of the charter. A national bank may not engage in manufacturing, for its charter gives it no authority therefor. Neither can a manufacturing corporation engage in banking, and for a like reason. Neither one can engage in the business of buying and selling stocks, because authority therefor is not granted in the charter of either, but nevertheless each has authority to take stock in another corporation as security for or in payment of a debt. It was so long since decided by this court, *First National Bank* v. *National Exchange Bank*, 92 U. S. 122, 126, 127, 128, in which the question presented, as stated in the opinion of the court, announced by Mr. Chief Justice Waite, was:

"Whether a national bank, organized under the national banking act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time, that, by turning the stocks into money under more favorable circumstances than then existed, a loss which would otherwise accrue from the transaction might be averted or diminished."

And answering that question in the affirmative, it was said:

"Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor.

Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by laws. Banks may do in this behalf whatever natural persons could do under like circumstances.

* * * * * *

"Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner* v. *Bank of United States*, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions."

In *California Bank* v. *Kennedy*, 167 U. S. 362, the right to take stock of another corporation as collateral security was affirmed.

In the case before us the bank had a claim against the Northwestern Manufacturing and Car Company. This was in 1884. The car company was in financial trouble and had been placed in charge of a receiver appointed by a State court. The bank, in connection with other creditors of the car company, organized a new corporation—the Minnesota Thresher Manufacturing Company—to buy the entire plant of the car company. It was so purchased and the bank surrendered its claim, taking in payment thereof preferred stock in the thresher company. The latter company carried on business until it failed, and then proceedings were had by which the defendant in error was appointed receiver and an assessment made by order of the court, which assessment is the basis of this action. Now, in accordance with the decision of this court in 92 U. S., *supra*, the bank had a right to surrender its claim and take stock in payment thereof. It did so, and, so far as the record shows, everything was done in good faith and in the belief that the best interests of the bank would be promoted thereby. Having thus become a stockholder in the thresher company it was entitled to all the benefits and subject to all the liabilities which attached to ownership of the stock. The fact that the arrangement antedated the organization of the thresher company is immaterial, for until the arrangement was carried into effect the claim of the bank against the car company was undisturbed. To hold that a national bank may take, in satisfaction of a claim, stock in a corporation already existing, and cannot agree to take in such satisfaction stock in a corporation to be created, and which is afterwards created, and whose stock is issued to it in payment of the claim, is to create a distinction without a difference and to sacrifice substance to

form. The transaction is precisely the same as though the thresher company had been fully organized and thereafter the bank surrendered its claim against the car company for stock in the thresher company, and that, as held in 92 U. S., is perfectly legitimate. It held that stock for nearly a score of years, its right to so hold being, so far as the record shows, unchallenged by the Government or any stockholder, and enjoying during that time all the benefits and profits resulting from such holding. Finally the thresher company became embarrassed. Its creditors proceeded against it, and then for the first time is it discovered that the holding by the bank of stock in the thresher company was unauthorized and illegal, and now it repudiates its liability as stockholder and leaves the burden of the thresher company's debts to be borne by the other stockholders. Certainly there is little in this to appeal to the sense of justice.

The bank was not, as suggested, investing in any merely speculative business. It was not accepting stock in a corporation organized for the business of buying and selling. It was no more engaged in a speculative transaction than if it had taken a piece of real estate in satisfaction of a debt, hoping that the time would come when that real estate would be worth as much or more than the debt. The object of the organization of the thresher company, as stated in its charter, was to purchase the plant of the Northwestern Manufacturing and Car Company—that is, to buy a single property which was then in the hands of the court and likely to be sacrificed in judicial proceedings. Clearly the creditors thought that by acquiring title and possession of the entire plant they could realize more than by a receiver's sale to outside parties; and at the same time, contemplating the possibilities of the future, they provided in the charter for the carrying on of a general manufacturing business. The scheme is clearly set forth in the following passage from the opinion of the Supreme Court of Minnesota, quoted in the opinion of this court:

"There are two general purposes for which the corporation was organized as declared by the articles—one the purchase of the capital stock, evidence of indebtedness, and assets of an existing corporation; and the other the manufacture and sale of all articles, implements, and machinery made of wood and iron, or either of them, and the manufacture of the materials therein used. The first purpose does not appear to be a necessary incident to the second one. On the contrary, the corporation was authorized to buy and sell the stock, choses in action and assets of the Northwestern Manufacturing and Car Company mentioned in the articles, without ever engaging in the business of manufacturing. The first purpose appears to be independent of the second one, for the power to buy necessarily includes the incidental power to use, collect, deal with, or sell the stock and assets of the then existing corporation. Nor does it fairly appear, expressly or by necessary implication, from the language of these articles, that such stock and assets were to be purchased only as a necessary incident to the declared purpose of manufacturing all articles which are made of wood and iron, or either of them."

Clearly the thresher company was no speculative corporation, but an ordinary and legitimate business venture. Suppose the bank had been the only creditor, is it possible that it could not have taken the whole car company's plant in satisfaction of its claim, and then held it in the hopes of being able to realize fully on the property? And if it could do so, acting alone and for its single interest, what is there in the organization of a national bank which prevents it doing the like thing in conjunction with other creditors?

Of course, as held by the Supreme Court of Minnesota, unless the thresher company was organized solely for the purpose of carrying on a manufacturing business, its stockholders would, under section 3 of article 10 of the constitution of Minnesota, be subject to the double liability. For if a power to engage in manufacturing exempts stockholders from double liability, no matter what other business the corporation is chartered to carry on, every corporation organizing under the Minnesota statutes would include that among its charter powers. We ordinarily accept the construction by a State Supreme Court of its constitution and laws as conclusive. In this case the construction placed by the Supreme Court of Minnesota upon this clause in the Constitution is so obviously right as to preclude the necessity of defense.

For these reasons, thus briefly stated, I am constrained to dissent from the opinion and judgment of the court, and am authorized to say that Mr. Justice BROWN concurs in this dissent.

True copy.

Test:

*Clerk Supreme Court, U. S.*